SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1950

No. 600

HERMAN LEE ROSS, PETITIONER,

vs.

THE STATE OF TEXAS

ON WRIT OF CERTIORARI TO THE COURT OF CRIMINAL APPEALS OF THE STATE OF TEXAS

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IN THE DISTRICT COURT OF GALVESTON COUNTY, TEXAS, 56TH JUDICIAL DISTRICT

THE STATE OF TEXAS VS. HERMAN LEE ROSS

MOTION TO QUASH INDICTMENT—Filed March 15, 1949

To the Honorable Judge of said court:

Comes now Herman Lee Ross, the defendant in the above numbered and entitled cause, by his attorney, Thos. H. Dent, and moves the Court to quash the indictment against him in this cause and for such would show to the Court:

[fol. 14] 1

That Herman Lee Ross, the defendant herein, is a Negro charged by indictment in this cause with the murder of Guido Nesti, a white man, in Galveston County, Texas, on or about June 1, 1948; that no Negro or person of African descent has ever served as grand jury commissioner in Galveston County, Texas; that in the past thirty years next preceding this indictment, no Negro or person of African descent has served, been appointed or selected grand jury commissioner in Galveston County, Texas; that no Negro or person of African descent was serving as grand jury commissioner in Galveston County, Texas, when the grand jury was selected which indicted this defendant; that the failure and or refusal of the District Court of Galveston County, Texas, to appoint and or select a Negro or person of African descent to serve as grand jury commissioner in Galveston County, Texas, for a great many years, was and is arbitrarily and intentionally done; that by a practice systematically excluding Negroes from service as grand jury commissioners over a long period of time because of race and color; the State of Texas has denied to the defendant, a Negro, that equal protection of the law and that due process of law as is guaranteed by the XIV Amendment to the Constitution of the United States of America and by Article 1, Section 19 of the Constitution of the State of Texas.

2

That for a period of thirty years next preceding this indictment only two Negroes or persons of African descent

have served as grand jurors in Galveston County, Texas; that no Negro was serving as a grand juror when this Defendant, a Negro, was indicted by a grand jury in Galveston County, Texas; that by systematically excluding Negroes from grand jury service for a grant number of years, in Galveston County, Texas, the State of Texas, solely because of race and color, denies and has denied to this defendant that equal protection of the law and that due proc-
[fol. 15] ess of law as is guaranteed to the defendant by the XIV Amendment to the Constitution of the United States of America and also section 19 of Article 1 of the Constitution of the State of Texas.

3

The defendant through his attorney, charges and alleges that the grand jury commissioners and also the grand jury which was selected by said commissioners were both illegal and that the indictment against him is illegal, in that for a great many years Negroes have been intentionally, arbitrarily and systematically excluded from service as grand jury commissioners and also from grand jury service in Galveston County, Texas, solely because of race and color and in violation of the Constitution of the United State-of America, and by so doing, the State of Texas, has denied the defendant, a Negro, that equal protection of the law and that due process of law as is guaranteed by the XIV Amendment to the Constitution of the United States and also Section 19 of Article 1 of the Constitution of the State of Texas.

4

The defendant through his attorney, charges and alleges that the United States Census Bureau for 1940, shows that the total population of Galveston County, Texas, was 81,173 and of this number of persons 17,712 or more than twenty percent of the population of Galveston County, Texas, are Negroes or persons of African descent and in this connection the defendant alleges that he believes approximately 20% of the total Negro population are Negro men possessing the qualifications of grand jury commissioners and also the qualifications of grand jurors but nitwithstanding such facts the District Court of Galveston County, Texas, has failed to appoint a Negro as grand jury commissioner and the grand jury commissioners have ex-

cluded persons of African descent from serving as grand jurors in Galveston County, Texas, solely because of race and color and such arbitrary and systematic action on the part of the grand jury commissioners has resulted in deny- [fol. 16] ing to this defendant the equal protection of the law in violation of the XIV Amendment to the Constitution of the United States of America and also in violation of Article 1, Section 19 of the Constitution of the State of Texas, and in violation of Article 338 of the Code of Criminal Procedure of the State of Texas, and for and on account of which this defendant cannot have a fair and legal trial by a jury of his peers as is guaranteed by law.

5

That a number of Negro men with qualifications to serve as petit jurors have been summoned but that this defendant believes and believing alleges that no Negro will be allowed to serve on the jury that will try this defendant, a Negro who has been accused of murdering a white man; the defendant believes and believing alleges that the County Attorney of Galveston County, Texas, will, as usual exercise the use of a peremptory challenge on all Negro men who may be on the panel and who may be examined as prospective jurors; the defendant also alleges that the use of a peremptory challenge on Negro men is a part of the scheme to exclude such person from petit jury service on the ground of race and color; the defendant also charges and alleges that he has been informed that another reason for excluding Negro men from trial jury-s in criminal cases is that when duly empaneled to try a case or a criminal case the jury cannot be separated and Negroes are not permitted to eat at cafes operated for white people and white jurors object to eating at a cafe operated for Negroes; that it is a matter of common knowledge that when a Negro is accused of committing a crium- against a white person and is tried by a white jury that such Negro is prejudged and the trial is a farce and merely symbolic and because of all of which this defendant cannot have a fair and impartial trial.

6

The defendant through his attorney charges and alleges that he, the defendant, has been and is illegally deprived of [fols. 17-26] his liberty by such illegal indictment and that

if he be forced and compelled to go to trial under said illegal indictment he may, and probably will be deprived of his life without due process of law and in violation of the XIV amendment to the Constitution of the United States and the laws made in pursuance thereof.

Wherefore, for the reasons above set forth, this defendant respectfully prays the Court to hear evidence upon and in support of this motion, that said indictment be quashed, that this cause be dismissed from the docket of this Court, and that this defendant be released from the custody of the Sheriff of Galveston County, Texas.

(Signed) Thos. H. Dent, Attorney for the Defendant.

Duly sworn to by Thos. H. Dent jurat omitted in printing.

[File endorsement omitted.]

[fol. 27] IN THE DISTRICT COURT OF GALVESTON COUNTY, TEXAS, 56TH JUDICIAL DISTRICT

No. 26,095

THE STATE OF TEXAS

vs.

HERMAN LEE ROSS

STIPULATION OF FACTS—Filed March 30, 1949

It is stipulated and agreed by and between the State of Texas, acting through the County Attorney of Galveston County, Texas, and the Defendant, Herman Lee Ross, by his attorney of record, Thomas H. Dent, that the Honorable Court of Criminal Appeals of Texas and the Honorable Supreme Court of the United States may review and determine the merit of Defendant's motion to quash the indictment in this cause because of discrimination against Negroes in the selection of grand jury commissioners, grand jurors and petit jurors, in Galveston County, Texas, on the following agreed facts, to-wit:

[fol. 28] 1

That Defendant's said motion was duly filed with the clerk of the trial court on the 15th day of March, 1949, and

called to the Court's attention and ruled on by the Court prior to Defendant's announcement of ready for trial and neither the Defendant or the State of Texas offered any evidence as to the matters of fact alleged in said motion because of the agreement by the parties to be bound by this stipulation.

2

That the manner of selecting Grand Jury Commissioners and Grand Juries in Galveston County and elsewhere through the State of Texas is now and for many years has been governed by Articles 333 to 357 of the Code of Criminal Procedure of Texas, which articles are made a part of this stipulation by reference.

3

The Code provides in effect that at each term of the District Court the judge thereof shall appoint three persons to perform the duties of jury commissioners who shall be intelligent citizens of the County and be able to read and write; be qualified jurors and freeholders in the County; be residents of different portions of the County. That the jury commissioners after being organized and given the oath set out in Article 335 C.C. P., select sixteen persons from whose number twelve are selected to act as a grand jury for the term of Court for which they are selected.

4

No Negro has ever served or been selected to serve as a grand jury commissioner in Galveston County for the past thirty years.

5

For a period of thirty years next preceding the return of the indictment in this cause only two Negroes have served as grand jurors in Galveston County.

[fol. 29]

6

The grand jury that indicted defendant in this cause consisted of twelve white men.

7

Defendant contends that the agreed facts stated in paragraphs 4, 5 and 6 of this stipulation establish as a matter

of law his allegations of racial discrimination as contained in his said motion.

8

In the selection of petit or trial juries Galveston County is now and for many years has been governed by Articles 2094-2095 R. C. S., of Texas, which Statutes are made a part hereof by reference known as the Jury Wheel Law. This law provides in effect that a circular hollow wheel made of iron or steel and so constructed as to freely revolve on its axle shall be provided by the commissioners court and kept in a safe and secure place where same cannot be tampered with. It is further provided that the opening to said wheel shall be secured by two locks in such manner as to make it impossible to open same unless both locks are unlocked at the time the wheel is opened. The law provides that the key to one lock is to be kept by the Sheriff and the other by the District Clerk, and that said wheel shall not be opened except when juries are drawn and then only in the presence of the judge drawing the jury panel and the Sheriff and the District Clerk or one of their deputies. The law provides that between the 1st and the 15th days of August of each year the Tax Collector, Sheriff, County Clerk and District Clerk or one of their respective deputies shall select from the list of qualified jurors for such County as shown by the tax lists in the Tax Assessor's office for the current year all qualified jurors and write their names on separate cards of uniform size and color and deposit same in the jury wheel. When juries are needed in the District or County Court Courts, the judge of the Court together with the Sheriff and the [fol. 30] District Clerk, or one of their respective deputies repair to the room where the jury wheel is kept and the wheel is opened and the Sheriff or his deputy draws from said wheel as by lottery cards one at a time until the required number of jurors have been drawn. The names of those drawn are written upon jury lists by the Clerk or his deputy in the order drawn from the wheel. The drawing and listing of the jurors names is supervised by the judge of the Court, who together with the Clerk or his deputy certifies to the observance of the statutory requirements.

9

The defendant makes no contention that any discrimination is now or has ever been practiced in Galveston County against the placing in the jury wheel of the names of all Negroes residing in the County whose names appear on the tax lists. Defendant agrees that the names of all Negroes residing in Galveston County whose names appeared on the tax rolls on the first of August preceding the return of the indictment in the instant case were placed in the jury wheel as required by law.

10

Defendant makes no contention that the judges, Sheriff and Clerks in drawing the names of jurors from said jury wheel make any discrimination against drawing the names of Negroes from said wheel or in placing their names on jury lists or in summoning those drawn to attend Court.

11

In short it is agreed that in so far as the selection, drawing and summoning of petit or trial juries are concerned there is not now and has not been for many years any discrimination against Negroes in Galveston County.

[fols. 31-240] 12

The Texas Code of Criminal Procedure allows the State and the Defendant in capital cases fifteen peremptory challenges each and it is defendant's contention that this privilege permits the State to thus elcminate all Negroes from trial jury.

13

Of the panel drawn for the trial of the defendant eighty-two men appeared and qualified of which number thirteen were Negroes being approximately fifteen percent (15%). Seven Negroes were examined before the jury to try defendant was completed, of these seven, four were peremptorily challenged by the State, one was excused by the Court because of sickness, and two were challenged for cause, because opposed to capital punishment. When the jury of twelve were completed, there remained six Negroes on the unexamined panel. Defendant used twelve peremptory challenges, the State used six.

14

That after the return of the indictment in the instant case, to-wit: The December, 1948 Grand Jury, two Negroes were appointed, and served; on the February, 1949, Grand Jury, one Negro was selected by the commissioners, but claimed his legal exemption because of being a practicing physician.

15

That the population of Galveston County, Texas, according to the 1940 United States Census was 81,173, of which 17,712 were Negroes; that the Negro population of Galveston County, Texas, constitutes slightly more than twenty-one (21) percent, of the total.

(S.) C. G. Dibrell, Judge.

(S.) Thos. H. Dent, Attorney for the Defendant.
(S.) R. E. Magee, County Attorney.

[File endorsement omitted.]

[fol. 241] In Court of Criminal Appeals of Texas

No. 24,630

Herman Lee Ross, Appellant

vs.

The State of Texas, Appellee

Appeal from Galveston County

Opinion—April 19, 1950

The appeal is from a conviction for murder, with the death penalty.

The indictment alleges that Herman Lee Ross, the appellant, killed Guido Nesti on the 1st day of June, 1948, by shooting him with a gun.

Nesti was the keeper of a package store. Appellant went to his place at night and, in the perpetration of a robbery, shot his victim to death while he was standing with his hands up. He then walked away from the scene. Parties who witnessed the crime recognized appellant as

he walked away, according to their testimony on the trial. Further facts in the case, including the circumstances of his arrest, his resistance and his shooting at the officers, certainly do not detract from the heinousness of his crime.

Thomas Dent, an attorney of the colored race, represented appellant and timely filed his motion to quash the indictment on the ground that the grand jury returning the indictment was composed entirely of white men. It is his position that in the impanelment of the grand jury discrimination against the colored race was shown contrary to the provisions of the Constitution of the United States. This raises a federal question, of which the Supreme Court of the United States has jurisdiction. If that court assumes jurisdiction, its decision is final.

Upon the issue thus raised there is in the record an agreement between State's attorneys and appellant's attorney, approved by the trial judge, that all appellate courts might determine the merit of appellant's motion to quash the indictment on the issue of discrimination on such agreed [fol. 242] statement of facts. It is not thought necessary to set out the facts incorporated in the agreement. It is appellant's contention that under the authority of the opinions of the Supreme Court of the United States the facts, upon the question of discrimination, bring him squarely within the holdings in the cases of Neal v. Delaware, 103 U. S. 370; 26 L. Ed. 567; Norris v. Alabama, 294 U. S. 587, 79 L. Ed. 1074; 55 S. Ct. 579; Pierre v. Louisiana, 306 U. S. 354, 83 L. Ed. 757, 59 S. Ct. 536; Smith v. Texas, 140 Tex. Cr. R. 565, 136 S.W. 2d 842, 311 U. S. 128, 85 L. Ed. 84; 61 S. Ct. 164; Hill v. Texas, 144 Tex. Cr. R. 415, 157 S.W. 2d 369, 316 U.S. 400, 86 L. Ed. 1559, 62 S. Ct. 1159. The facts in the two Texas cases are so similar to those shown in the agreed statement found in the present record that no reasonable ground can be discovered why the holding of the Supreme Court of the United States in the Smith and Hill cases would not be followed by that court.

The facts of this case show without dispute a murder for the purpose of perpetrating a robbery. The appellant is a negro, his victim a white man, an Italian by birth. In addition to the circumstances of the crime, appellant's own witness placed on the stand by his attorney to testify in his behalf, Dr. E. A. Etter, testified that he had known appellant all of his life; that he had long been a sufferer from tuberculosis and syphilis; that: "He has been an out-

cast, a waif of society, * * *." He said that appellant had a tendency to kill and wanted to kill, and that he had never mixed with society or made any contribution to it.

It would, in the opinion of the writer, be a reflection on the colored race to say that they would not return an indictment in this case, even if the grand jury was composed of negroes in its entirety. We disclaim any intention to hold that any one of them would object to the return of a bill of indictment of this appellant, or any other person [fol. 243] where the evidence was even similar to that now before us. However, we must recognize the holdings of the Supreme Court of the United States in cases so very similar that they cannot be distinguished from that now before us. Galveston County, with several thousand negro voters, has had two negroes on grand juries during the past thirty years. This showing will not satisfy the court that has definitely and positively expressed its view on the question of discrimination in the authorities cited.

The judgment of the trial court is reversed and the prosecution is ordered dismissed.

Beauchamp, Judge.

(Delivered April 19, 1950.)

[fol. 244] In Court of Criminal Appeals of Texas

No. 24,630

Herman Lee Ross, Appellant,

v.

The State of Texas, Appellee.

Appeal from Galveston County

Dissenting Opinion—April 19, 1950

The statutes of Texas relative to the selection of grand jurors are explicit, and such commissioners must possess the following qualifications.

"1. Be intelligent citizens of the county and able to read and write.

2. Be qualified jurors and freeholders in the county.

3. Be residents of different portions of the county.

4. Have no suit in said Court which requires the intervention of a jury.

5. The same person shall not act as Jury Commissioner more than once in the same year. (Art. 333, Vernon's Ann. C.C.P., 1948)."

These three men shall select sixteen men from different portions of the county as grand jurors, who shall each have the following qualifications:

"1. He must be a citizen of the State, and of the county in which he is to serve, and qualified under the Constitution and laws to vote in said county; but, whenever it shall be made to appear to the court that the requisite number of jurors who have paid their poll taxes can not be found within the county, the court shall not regard the payment of poll taxes as a qualification for service as a juror.

2. He must be a freeholder within the State, or a householder within the county.

3. He must be of sound mind and good moral character.

4. He must be able to read and write.

5. He must not have been convicted of any felony.

6. He must not be under indictment or other legal accusation for theft or of any felony. (Art. 339, Vernon's Ann. C.C.P., 1948)."

The statute makes no further demands relative to such grand jurors other than as above stated. Naught is found in our statutes relative to whom they shall be, nor to the method as to how they shall be listed, nor as to their color or race.

[fol. 245] It is stipulated herein that no person of the negro race, save one, for a period of thirty years had served on a grand jury in Galveston County, and the argument follows that one judging the present by the past, the claim is made that such shows a discrimination against the colored race upon the part of jury commissioners in the past and at the present time. In other words, this is trying the present jury commission upon the action of commissioners of the past thirty years and finding the acts of these earlier commissioners conclusive of the discrimination of the present three commissioners. This is ex post facto testimony at least. This record shows the presence

of seven negroes on the trial jury venire and one wonders if such reflects discrimination against appellant's race.

One is again led to wonder how long will this record of commissioners of the past remain the standard on which a court should decide that such ancient acts of those long since passed from the stage of action as the scales in which a high court would weigh the acts and motives of the present jury commissioners.

If due process of law means a fair and impartial trial, enforcement officers should be told how long they should be under a prejudgment of the higher court as having violated the American Common Law, as found not in a statute but in the decisions of the high court of the land.

Furthermore, one wonders which ones of our statutes have been repealed by a quasi-legislative authority, as for instance, the statute relative to the appointment of an attorney for a defendant only in a matter charging a capital offense.

One wonders again where it is said, either by statute or in common-law decisions, that due process of law depends upon the actions of men for thirty years back.

[fols. 246-257] I, therefore, enter my dissent herein upon the belief that this man has received a fair and impartial trial (Lisenba v. California, 314 U.S. 219-243, 86 L. Ed. 167, especially p. 180, Headnote 12) and that there has been no unfair discrimination against him shown; that the acts of the past grand jury commissioners are neither conclusive nor persuasive of the acts of the present commissioners in the selection of the grand jury that found the indictment against appellant, nor do I find aught against the fairness of his treatment before this trial jury.

It is apparent from the facts herein presented that it would be incredible to believe that any grand jury, no matter of what color composed, could fail to return an indictment against this man for this useless killing. The finding of an indictment alone by this grand jury is the matter at issue, and not the trial upon the merits. I do not think the personnel of this grand jury, nor of the previous grand juries for a long period of time, could have affected the giving of a fair and impartial trial of this appellant before a trial jury on a murder indictment found by any grand jury.

Recognizing the futility of a dissent in this cause, nevertheless, my views are herein expressed, based on the con-

viction that this man has had a fair and impartial trial; that a useless thing would be done by dismissing this indictment, to be again heard by another grand jury composed in some part at least of men of different races.

I, therefore, respectfully dissent herein.

Graves, Judge.

(Delivered Apr. 19, 1950)

[fol. 258] In Court of Criminal Appeals of Texas

Appeal from Galveston County

No. 24,630

Herman Lee Ross, Appellant,

v.

The State of Texas, Appellee

Opinion on State's Motion for Rehearing—June 7, 1950

In our original opinion herein, this court, as well as many other judges throughout this state, had labored under the impression that the cases cited in our original opinion had held in effect that the intentional exclusion of negroes upon a grand jury venire would offend against what the Supreme Court of the United States had decided the Federal Constitution meant by "due process of law" as set forth in its Fourteenth Amendment thereto, which reads in part as follows:

> "• • • nor shall any state deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

It is here worthy of comment that this article nowhere mentions the words "color or race", but such phrase is found in the Fifteenth Amendment wherein the State is prohibited from denying or abridging the right to vote on account of race, color, or previous condition of servitude.

The case of Neal v. Delaware, 103 U. S. 370, 26 L. Ed. 567, is not perfectly clear as to its holding. However, the Constitution of Delaware did provide at such time that

jurors in all courts should be composed of white men. Justice Field, with peculiar foresightedness, did foresee that eventually the problem would arise that a Caucasian or Mongolian might, under such attempted denial of his right to sit as a juror, offer the demand that he be presented before a jury composed entirely of his own race, this latter idea being one towards which the decisions of this court were thought by so many to be finally progressing. It must be remembered that the element in the Delaware Constitution limiting the jurors to the white race had not been repealed at the time of the decision in the case of [fol. 259] Neal v. Delaware, supra. While same was decisive of the question of the removal of Neal to the Federal Court, its decision was only persuasive relative to the line of cases later decided and here referred to.

In Norris v. Alabama, 294 U.S. 587, 79 L. Ed. 1074, 55 Sup. Ct. 579, we first find the court using the general proposition that the continued exclusion of negroes from juries is in itself alone evidence of intentional discrimination against them, regardless of the contra testimony of the person preparing the lists of prospective jurors to be submitted to the jury commissioners. We thus find present grounds at least for a wide belief among the legal fraternity that such a failure to present possible negro jurors is of itself satisfactory proof to the Supreme Court of intended exclusion and therefore lack of due process of law.

In Pierre v. Louisiana, 306 U.S. 354, 83 L. Ed. 757, 59 Sup. Ct. 536, it was provided by law that after ascertainment of a certain amount of names, there should be drawn 300 names as prospective jurors and out of such names the court should select 20 citizens out of 50 names supplied possessing the qualifications of grand jurors and out of such 20 names the court should select the 12 who should constitute the grand jury. The remaining members of the venire were to constitute the petit jury. It was admitted by the trial court that the list of the jurors called as a petit jury bore evidence of a discrimination against Pierre, and he quashed such portion thereof and ordered another jury to be drawn, but failed to quash the grand jury venire, they being the one finding the indictment. Evidently the trial court gave credence to the statute relative to the qualifications demanded thereunder for grand jurors. It was shown by the proof that for about 60 years no negro was drawn and but one had served in any capacity as a

juror, and that the population of such parish was about equally divided between the white and colored races. This was held to be a denial of due process of law.

[fol. 260] We then come to the case of Smith v. Texas, 140 Tex. Cr. R. 565, 136 S.W. (2d) 842, 311 U. S. 128, 85 L. Ed. 84, 61 S. Ct. 164, in which it was held that although the state statutes of Texas relating to the selection of grand jurors is not unfair, nevertheless, the outcome of the matter empowers the Supreme Court, as a finder of facts, to conclude that the frequent placing of a negro's name on such grand jury list as No. 16 in itself evidenced discrimination against the race, even though such discrimination is denied by the grand jury commissioners. Again, such court resorts to the population argument and finally practically determined for itself the fact that although the Texas statutory scheme is not unfair, that the execution thereof does become unfair if the commissioners fail to not only select possible negro grand jurors, but it also determines the numerical place on the presented list of such person. Juror population cannot be determined by poll taxes issued in Texas at least. Women pay poll taxes also, but under the present law, they cannot serve on juries, and a fair estimate should equally divide the poll taxes as between the sexes.

Again, there is a difference in the standard required by law between grand and petit jurors. Our "not unfair" statute prescribes a higher standard for a grand juror. Art. 339, Vernon's Ann. C.C.P., provides that (1) he must be a citizen and qualified to vote, thus requiring a poll tax in Texas; (2) he must be a freeholder in the state or a householder in the county; (3) he must be of sound mind and good moral character; (4) he must be able to read and write; (5) he must not have been convicted of any felony, and (6) he must not be under indictment or other legal accusation for theft or felony.

It should be seen that the number of poll tax payers is not of much value in determining the qualifications nor fitness of probable grand jurors; and the use of such would mislead one as to whether an individual would fit the standard thus set for a grand juror; a sound mind and good [fol. 261] moral character being a fair requisite for a grand juror in Texas; acquaintanceship at least with the individual should be required, especially on the ground of good moral character, and such being not a matter of reputa-

tion but of knowledge, it becomes difficult to see how a commissioner could adhere to such an admonition unless he knew the desired person and was familiar, not only with his reputation but also with his moral character, as well as his record as a citizen.

In the case of Hill v. Texas, 114 Tex. Cr. R. 415, 157 S.W. (2d) 369, 316 U.S. 400, 86 L. Ed. 1559, 62 S. Ct. 1159, it appears that the motives of the commissioners in drawing the grand juries for many years past is utilized as cogent testimony that the present commissioners were also guilty of discrimination, laying down a punitive measure because of the sins of our fathers and a decision of "like father like son".

Under this line of decisions above mentioned, once having opened Pandora's box, this court found itself under the settled idea that the above cases were reversed because the Supreme Court found itself of the belief that negroes had been discriminated against because of their color and race in that they were not drawn on grand juries and none were members thereof wherein indictments were found against members of their race, and such was denounced by the Supreme Court as unfair discrimination. Therefore, the judges of Texas were careful to instruct their jury commissioners not to discriminate in any manner against any person, and under a fair effort many commissioners tried to find colored persons who met the requirements of the statute as a grand juror. However, in the most recent case of Cassell v. Texas, reported in Law Ed. Advance Opinions, Vol. 94, No. 13, pp. 563, 577, (216 S.W. (2d) 813), we are led to believe that such interpretation of these opinions was in error. In that case reference is made to Akins v. Texas, 325 U.S. 398, 405, 89 L. Ed. 1692, 65 S. Ct. 1276, wherein the doctrine of a pro rata representation on such grand juries is repudiated. Nevertheless, we find such [fol. 262] proportions used as a basis of argument relative to such discrimination, and was used in Neal v. Delaware, supra, and Pierre v. Louisiana, supra, as well as adverted to in Hill v. Texas, supra. With such repudiation we find the Cassell case, supra, declaring "that the Constitution requires only a fair jury selected without regard to race. Obviously the number of races and nationalities appearing in the ancestry of our citizens would make it impossible to meet a requirement of proportional representation. Similarly, since there can be no exclusion of Negroes as a

race, and no discrimination because of color, proportional limitation is not permissible."

The Cassell case, supra, was reversed because it is shown that the commissioners knew but one negro whom they thought measured up to the statutory qualifications and he could not serve. In other words, that cause was reversed because the commissioners did not hunt for and find negroes who were of sound mind and good moral character, etc. This fair test cannot be made by assuming that such virtues exist. They cannot be assumed because of population, that is, that some citizens out of many are bound to possess such qualities. Such can only be ascertained by acquaintanceship, and under the testimony of the commissioners in this (Cassell) case, they knew of but one and he refused to serve. While others might have possessed a good reputation as given him by his neighbors, his character was another matter. Although the record therein does not disclose a purposeful and designed exclusion in such case, it is held (p. 571) that it indicates that the commissioners attempted to do their duty, but that they misconstrued what was their duty and thought under Hill v. Texas, supra, that one negro on the grand jury would satisfy the requirement of such decision. We quote from the Cassell case (p. 572) as follows:

> [fol. 263] "This is of course a misconception. The prohibition of the Constitution against discrimination because of color does not require in and of itself the presence of a Negro on a jury. But neither is it satisfied by Negro representation arbitrarily limited to one. It is not a question of presence on a grand jury nor absence from it. The basis of selection cannot consciously take color into account. Such is the command of the Constitution. Once that restriction upon the State's freedom in devising and administering its jury system is observed, the States are masters in their own household. If it is observed, they cannot be charged with discrimination because of color, no matter what the composition of a grand jury may turn out to be."

In other words, it seems that if negroes are not on the grand jury, it does not necessarily show discrimination, and if they are not on the grand jury, such is not discrimination, but a failure to inquire and "learn whether there were per-

sons among the negroes they did not know who were qualified and available for service'' would result in discrimination.

An inquirer is led to wonder whether in the states that have no grand juries provided by statute but present their felonies by means of information, in what manner they are to be governed by the cases herein discussed. Again, in Texas, county court prosecutions can be presented by complaint and information. In a search for discrimination, the county attorney is the instigator of such prosecutions. We know of none ever having held such position in our memory save white persons. All judges since the days of the Reconstruction, as well as Justices of the Peace, and also Legislators, have been white persons; and it is only left as a matter of speculation how far the deeds of our fathers shall be the basis of an assumption of misdeeds for the present generation.

After all, the grand jury's finding is but preliminary, as is also the finding of the Justice of the Peace; and no conviction can be had by a grand jury, and it only takes the vote of nine to present an indictment.

Due process of law means only ''a fair and impartial trial'' upon the facts. Lisenba v. California, 314 U. S. 219-243, 86 L. Ed. 167.

[fol. 264] The ultimate end and the purpose of an indictment in the states requiring same in felony cases is the trial of the case before a petit jury. Nine men can find an indictment, but it requires twelve men and a unanimous verdict to assess a penalty. Grand juries are but a preliminary to the final trial of a case.

In the present case, the motion to quash being based upon stipulations alone, we find the statement made by appellant's diligent attorney, among other things, that no negro has served, or been selected to serve, as a grand jury commissioner in Galveston County for the past thirty years, and during such term only two negroes have served as grand jurors therein. Appellant bases his motion to quash and contention of discrimination on the above facts. The stipulation, however, goes further and shows that as to petit juries, the wheel system prevails in such county, as is shown by Articles 2094-2095, Revised Civil Statutes of the state, that is, that the names of all taxpayers in the county are taken from the tax rolls and placed in a receptacle called the ''wheel'' and rotated therein, and names are drawn

therefrom by certain officers and these make up the list of petit jurors utilized in court as needed. It is agreed that such is a fair method and no complaint is lodged thereat. Again, it is agreed that no discrimination is complained of in the method of selecting such petit jurors, and that in said "wheel" there is placed the names of all negroes in such county whose names appeared on such tax rolls preceding the return of this indictment, and that such were fairly drawn therefrom. There is not now, nor has there been for many years, any discrimination relative to petit or trial juries in Galveston County. The stipulation continues:

> [fol. 265] "Of the panel drawn for the trial of the defendant eighty-two men appeared and qualified of which number, thirteen were Negroes being approximately fifteen percent (15%). Seven Negroes were examined before the jury to try defendant was completed; of these seven, four were peremptorily challenged by the State, one was excused by the Court because of sickness, and two were challenged for cause, because opposed to capital punishment. When the jury of twelve were completed, there remained six Negroes on the unexamined panel. Defendant used twelve peremptory challenges, the State used six.
>
> That after the return of the indictment in the instant case, to-wit: The December, 1948 Grand Jury, two Negroes were appointed, and served; on the February, 1949, Grand Jury, one Negro was selected by the commissioners, but claimed his legal exemption because of being a practicing physician.
>
> That the population of Galveston County, Texas, according to the 1940 United States Census was 81,173, of which 17,712 were Negroes; that the Negro population of Galveston county, Texas, constitutes slightly more than twenty-one (21) percent, of the total."

It appears therefrom that it is admitted by appellant that he received a fair and impartial trial before the petit jury that tried him in such county. However, it is evident from his bills of exception that he complains because of the State's exercising its peremptory challenge against four of the negroes present in the petit jury panel. Such matters

surely are relegated to the judgment of the State's attorney, and its exercise cannot be governed by judicial fiat.

If due process of law resolves itself into a fair and impartial trial, then appellant admits having received such, regardless of the color of a grand jury commissioner, or the actions thereof in the past. As said in the original opinion, we cannot bring ourselves to conceive of any grand jury that would hesitate to present for trial one who, in the perpetration of robbery, would shoot his victim as his hands were upraised, and then attempt to malign his brethren of like color by expecting them to refuse to indict him for his misdeed. The question of an indictment can be taken for granted by any twelve men who fill the statutory require-[fol. 266] ments for grand jurors. To believe otherwise would shock one's conscience and shake faith in the civilization which a democratic people have builded through the years. The ultimate end of a trial is a fair trial. Appellant agrees that he has received such. We agree that the effect of a quashal of this indictment would be a useless thing, and as Justice Jackson said in the Cassell case, would be holding in effect "that the crime of discrimination offsets the crime of murder and that the State must start over again, if death or witnesses, loss of evidence or other conditions wrought by time do not prevent."

It is our judgment that this appellant has received a fair and impartial trial as he admits, and thus believing the State's motion for a rehearing is granted, the order of reversal is set aside, and the judgment is now affirmed.

Graves, Judge.

(Delivered June 7, 1950.)

[fol. 267] IN COURT OF CRIMINAL APPEALS OF TEXAS

Appeal from Galveston County

No. 24,630

HERMAN LEE ROSS, Appellant,

v.

THE STATE OF TEXAS, Appellee

CONCURRING OPINION ON STATE'S MOTION FOR REHEARING—June 7, 1950

My views are expressed in the State's Motion for Rehearing prepared and filed by the Honorable Raymond E. Magee, County Attorney of Galveston, Texas. I have decided to adopt it as my concurring opinion. Omitting the formal heading and the closing prayer and signature, it is as follows:

"In reversing the judgment of the trial court and ordering dismissal of the prosecution of Appellant under the present indictment this Honorable Court felt itself enjoined to so rule by reason of the holdings of the Supreme Court of the United States in Smith vs. Texas, 85 L. Ed. 84, and Hill vs. Texas, 86 L. Ed. 1559. This is evidenced by the following quotation from the opinion:

'The facts in those two cases are so similar to those shown in the agreed statement found in the present record that no reasonable ground can be discovered why the holding of the Supreme Court of the United States in those cases would not be followed by that court in this case.'

"We respectfully but most earnestly contend that the record in this case presents an agreed set of facts that clearly distinguishes it from both the Smith and Hill cases, as well as from all other cases decided by the Supreme Court on this subject including the Cassell case: That if this case is permitted to reach the Supreme Court it will present a simple and clear-cut question of law that has never been passed upon or presented to that court.

"It will permit and require the Supreme Court to declare definitely and unequivocally whether the Fourteenth Amendment to the Federal Constitution demands (in felony pros-

ecutions against negroes) that there be no discrimination against negroes—or conduct from which such discrimination might be inferred—, in the selection of grand jurors [fol. 268] or in the selection of grand jury commissioners, and that such is the law even though it be admitted that no discrimination was practiced to bar negroes from the petit or trial jury which tried and convicted a negro defendant.

"It will require that court to decide, in principle, whether a negro convicted by a petit jury of twelve negroes can complain that he was denied the equal protection of the laws because he was brought to trial upon an indictment presented by a grand jury composed of twelve white men; It will decide whether a negro convicted and deprived of his life, liberty or property by a petit jury of twelve negroes on an indictment voted and returned by a grand jury consisting of twelve negroes can still contend he was denied the equal protection of the laws because negroes were designedly excluded from the commission that selected the all Negro Grand Jury.

"The record in this case with the co-operation of Thomas H. Dent, Esq., Appellant's attorney, who incidentally is also of the negro race, has been carefully prepared so as to put these questions squarely before the Supreme Court free from any fact issue. To the present the Supreme Court has not ruled with Appellant's contention and if the law is as so contended by Appellant the people of the State of Texas and of the entire Southland are entitled to have the Supreme Court so state clearly and definitely. Such a ruling is most appropriate and necessary for the due administration of the penal laws of the State of Texas as well as the nation as a whole.

"The Defendant, Herman Lee Ross, by his attorney of record, has stipulated and agreed in effect as follows:

"(a) That in so far as the selection, drawing and summoning of petit juries are concerned there is not now and has not been for many years any discrimination practiced in Galveston County against negroes.

"(b) That for many years Galveston County has been operating under what is known as the 'Jury Wheel' law, which requires the names of all male persons residing in the county and whose names appear on the tax lists in the Tax Assessor's Office, to be written on cards of uniform [fol. 269] size and character and placed in said jury wheel. The filling of the wheel to be done annually by the Sheriff, County Clerk, District Clerk and Tax Assessor.

"(c) That the names of all negroes residing in Galveston County appearing on the tax lists on the 1st day of August preceding the return of the indictment in this case were placed in the jury wheel as required by law.

"(d) That no discrimination was practiced in the selection of the panel from which the trial jury was selected in this case and that no discrimination has been practiced in the drawing of the names of jurors from said wheel in this county for many years.

"(e) That of the panel drawn and summoned for the trial of the Defendant in the instant case 82 men appeared and qualified of which number 13 were negroes, being approximately 15% of the total. Seven negroes were reached on voir dire examination before the jury of twelve was completed; of these seven four were peremptorily challenged by the State; one was excused by the court because of sickness, and two were challenged for cause because opposed to capital punishment; that when the jury of twelve was completed there still remained six negroes on the unexamined panel; that Defendant used only twelve of his fifteen peremptory challenges and the State used six.

"(f) That in addition to stipulating the facts as above summarized Defendant further stipulated that he makes no contention that there is now or has ever been any discrimination practiced in Galveston County against negroes serving on petit or trial juries.

"Notwithstanding these admissions and the further fact that Defendant exercised only twelve of his fifteen peremptory challenges, thus making no attempt to have any of the negroes still on the panel placed on the jury, and that he accepted each of the twelve white jurors without objection, he contends he was denied equal protection of the laws, contrary to the Fourteenth Amendment.

[fol. 270] "But for the apparent holding in the Smith and Hill cases, to which now must be added the Cassell case, this contention would sound actually silly. And if the Supreme Court meant to so hold in those cases we must confess to an incapacity to comprehend its line of reasoning.

"Such a holding would as above suggested permit a negro tried and convicted by a jury composed entirely of members of his own race to contend he had been denied the equal protection of the laws because discrimination had been practiced *either* in the selection of the grand jury that indicted him *or* in the selection of the commissioners who

in turn had selected said grand jury, even though said grand jury was likewise composed entirely of negroes.

"If this is logical reasoning and if it is the law, would not the argument, by easy transition, that absence of negroes from the bench of this Honorable Court, and for that matter from the Supreme Court of the United States, likewise constitute a denial of the equal protection of the laws. The answer that our Texas judiciary are elected by the people and the Fourteenth Amendment forbids only a *State* from depriving a person of life, liberty or property without due process of law, etc., does not satisfy. The judges of the Supreme Court are appointed just like grand jury commissioners and grand jurors. The judges of some of the States are appointed and Texas has the power to change the method by which its judges are selected. An indictment like an information or complaint is merely the formal charge by which an accused is brought to trial. It carries no presumption of guilt this Honorable Court has held it to be reversible error for a trial court to fail to so charge upon request. The Fifth Amendment to the Federal Constitution applies only to Federal courts and Texas can abolish the office of an indictment and bring offenders, even for capital offenses, to trial by information or complaint (Bollin vs. Nebraska, 44 L. Ed. 382). This being true then would it not be just as logical to argue that the absence of negro police clerks, justices of the peace, assistant district and county attorneys and other clericals [fol. 271] who have to do with passing upon the credibility of the complainant, weighing the evidence and preparing and filing the complaint or information, constitutes a denial of due process as to raise the point with respect to grand jurors and grand jury commissioners?

"The fallacy in Appellant's contention springs from the false premise that the formation, personnel or complexion of a grand jury can result or tend to result in depriving an accused from receiving a fair and impartial trial. The Fourteenth Amendment guarantees that no person shall be deprived of life, liberty or property without due process of law and that no person shall be denied the equal protection of the laws. But grand jury commissioners and grand jurors do not perform the function to or have the right or power to pass upon the guilt of an accused and to deprive him of his life, liberty or property. This is the sole and exclusive province of the trial or petit jury whose unani-

mous verdict is necessary to convict of crime. Let us repeat here that Herman Lee Ross agrees he was tried and convicted by a jury selected without discrimination and that he makes no contention he was denied the equal protection of the laws in so far as his trial jury was concerned.

"To appreciate the maze of complexity and uncertainty to which the state courts are being lead by the Supreme Court in such cases as Smith, Hill and Cassell it should be remembered that the phrase 'racial discrimination' does not appear in the Constitution. That is a phrase coined by the Supreme Court. Discrimination as to nationality and religion can just as logically be termed denial of due process as racial discrimination. True, this Court said in Sanchez vs. State, 181 SW (2) 87;

> 'In the absence of a holding by the Supreme Court that nationality and race bear the same relation within the meaning of the Constitutional provisions mentioned, [fol. 272] we shall continue to hold that the law of this State furnishes the guide for the selection of juries in this State.'

"We find no record that certiorari in the Supreme Court was sought by Sanchez. Justice Field's dissent in Neal vs Delaware is interesting and logical reading on this phase of the question. Also Justice Murphy's dissent in Aikin vs Texas, 89 L. Ed. 1692, which was joined in by Justices Stone and Black, indicate a variance from your Honors views as expressed in the Sanchez case. Who can say what future opinions may bring in this respect.

"The question whether racial discrimination in the selection of grand and petit jurors violated the Fourteenth Amendment first came before the Supreme Court in the year 1881 (only a few years after the adoption of that amendment) in Neal vs Delaware, 26 L. Ed. 567.

It is a historical fact that the people of the State of Delaware while remaining in the Union, were nevertheless bitterly opposed to the adoption of the Fourteenth Amendment. The Amendment was rejected by the Legislature of Delaware on February 7th, 1867, and it was not until February 1901 that Delaware ratified said Amendment.

"As reflected in the opinion no denial was made or attempted that negroes were excluded from all jury service

at the time in question. It was boldly asserted by the officials of the State of Delaware in the Neal case that all or practically all negroes were so lacking in intellect, honesty and morality as to be unfit to perform jury duty. [fol. 273] "The Supreme Court was dealing with open defiance to the clear spirit intent and purpose of the Fourteenth Amendment. The court was dealing with a political as well as a judicial question. The members of this court if not familiar with the opinion in the Neal case will read same, therefore we will not burden this motion with quotations therefrom. That opinion cannot be construed as holding that absence of negroes from grand juries and from commissions appointed to select grand jurors, standing alone, violates the Fourteenth Amendment.

"Neal vs Delaware was followed nineteen years later by Carter vs Texas, 44 L. Ed. 839 (decided April 1st, 1900).

"In the Carter case motion was made to quash the indictment and dismiss the prosecution because of discrimination against negroes in the selection of both the grand and petit juries. He charged that negroes had been excluded from all jury service in Galveston County for many years by reason alone of their color. He offered to prove his charges. The State made no denial and the court refused to permit any evidence to be offered on the motion. The case was reversed by the Supreme Court on authority of Neal vs Delaware.

"The next time the question was presented to the court was in Norris vs Alabama, 79 L. Ed. 1074 (decided April 1st, 1939). Again the motion to quash charged that negroes had for many years been excluded from all jury service in the county where the indictment was returned as well as in the county where it was brought to trial, by reason alone of their color.

"The record showed without question the charge was true. The Supreme Court went into the evidence thoroughly and not only so found but also found the record had been 'doctored' so as to falsely make it appear that negroes' names appeared on the jury lists. We will burden this motion with but a short quotation from the Norris case:

> 'We are of the opinion that the evidence requires a different result from that reached in the State Court. We think the evidence that for a generation or longer no negro had been called for any jury service in Jack-

son County; that there were negroes qualified for jury [fol. 274] service * * * but that no names of negroes were placed on the jury rolls, establishes the discrimination which the Constitution forbids.'

"Norris vs Alabama was followed by Pierre vs Louisiana, 83 L. Ed. 757, (decided February 27th, 1939). Again the charge was made and not denied that negroes had for many years been excluded from both grand and petit jury service in the parish in question by reason alone of their color. It seems that a general panel of jurors were selected from which both the grand jury and the trial juries were drawn. Motion was made to quash both the grand and petit jury panel. The State made no denial of Pierre's charges. The trial court granted the motion to quash the petit jury panel but overruled the motion to quash the grand jury panel. The Supreme Court reversed on authority of Neal vs Delaware and Norris vs Alabama.

"In the Pierre case the court came closer to the point presented in the instant case than in any other case wherein the court said that the same reasons that prompted the trial court to quash the petit jury should have prompted it to quash the grand jury panel. Such casual expression however should not be accepted as a mature and final expression on so important a matter.

"Up to this time the Supreme Court was dealing with situations showing a real and substantial discrimination against negroes for all jury service.

"Then comes Smith vs Texas, 85 L. Ed. 84 (decided —— —, ——). The entire opinion deals with the manner of selecting grand juries in Harris County. No mention whatever is made with reference to the manner of selecting petit juries. No authorities are cited in the opinion although the footnotes refer to the Neal, Norris, Carter and Pierre cases. Justice Black simply states that the method employed in Harris County in the seclection of grand juries constituted a denial of due process of law. [fol. 275] "The Hill case decided June 1st, 1942, less than 18 months after the Smith case likewise makes no reference to the manner of selecting petit juries but the following significant statement appears in the opinion:

'Certiorari was granted in this case on Neal vs. Delaware, 26 L. Ed. 567. More than sixty years ago, in Neal vs Delaware, *a case substantially like the pres-*

ent, this court laid down the rule which we think controlling here; " 'the showing thus made, including as it did, the fact (so generally known that the court felt obliged to take judicial notice of it) that no colored citizen had ever been summoned *as a juror in the courts of the State*,—although its colored population exceeded twenty thousand in 1870, and in 1880 exceeded twenty six thousand, in a total population of less than one hundred and fifty thousand—presented a prima facie case of denial, by the officers charged with the selection of grand *and petit* jurors, of that equality of protection which has been secured by the Constitution and Laws of the United States.' " '

"To summarize the Neal case is cited by the Supreme Court as authority for all the later cases on the subject. In the Neal, Carter, Norris and Pierre cases the record affirmatively shows negroes were barred from all jury service. In the Smith, Hill and Cassell cases the record is silent as to the method used in selecting petit juries. This case would present for the first time to the Supreme Court a record wherein it was admitted there was no discrimination in the selection of the trial or petit jury. This is a real and substantial distinction and entitles it to be presented to the Supreme Court.

"While Texas was sustained in the Aiken case, 89 L. Ed. 1692, Justice Murphy's dissenting opinion adds confusion and uncertainty to holdings in the Smith and Hill cases. And this confusion and uncertainty is increased by the decision in the Cassell case as indicated in newspaper reports. Justice Murphy frowned upon the practice of consistently putting any particular number of negroes on the grand jury whether that number be one or five. He says the record (Aiken case) reflects this was done in Dallas County and " 'to that extent they have ignored the ideals of the jury system.' "

[fol. 276] "As pointed out by Judge Davidson in the Cassell case, 216 SW (2d) 813, the officials of Dallas County have sincerely and honestly endeavored to follow the mandate handed down by the Supreme Court in the Hill case but the Supreme Court's action in the Cassell case shows they have failed to satisfy the Supreme Court.

"The time has come when the Supreme Court should be urged to re-examine its views on this subject. It may be a long time before this court again has before it a record

which so clearly and indisputably presents the sole question of Constitutional law involved.

"If this court is satisfied Ross has had a fair and impartial trial but for the question of jury discrimination it should not hesitate to, and we respectfully say it is the courts duty to withdraw its opinion reversing this case and affirm the judgment of the trial court so that the Supreme Court will be called upon to write again, and definitely, upon this important subject. A clear-cut and definite expression from the Supreme Court is most necessary and desirable to the nation as a whole in the proper enforcement of its criminal laws. This court should aid in securing such ruling.

"The press reports are to the effect that Justice Jackson in his dissent in the Cassell case said:

> 'This court has never explained how discrimination in the selection of a grand jury, illegal though it be, has prejudiced a defendant whom a trial jury, chosen without discrimination, has convicted.'

"This is exactly the argument we make and Justice Jackson's words indicate the light is dawning. By the time this case reaches the Supreme Court very probably other members of the court will be converted to his line of reason."

When the rule of inclusion or exclusion as announced in the Cassell case is applied to the actual organization of a grand jury in this state, it will render impotent and nugatory our statutes regulating the formation of grand juries in this state which have been approved by the Supreme [fols. 277-284] Court of the United States as being not unfair and as being capable of being fairly enforced, and which, by practical application and use in this state throughout its history, have been found to be reasonable, fair, and sufficient.

I can not agree that this be done without again giving our United States Supreme Court the opportunity to reexamine the question.

Hawkins, Presiding Judge.

(Delivered June 7, 1950.)

[fol. 285] In Court of Criminal Appeals of Texas

Appeal from Galveston County

No. 24,630

Herman Lee Ross, Appellant,

v.

The State of Texas, Appellee

Opinion on Motion for Rehearing—October 25, 1950

Appellant's motion for rehearing is devoted to his contention that racial discrimination as a matter of law in violation of the Fourteenth Amendment to the Constitution of the United States is shown by the following stipulated facts:

1. No negro has ever served or been selected to serve as a grand jury commissioner in Galveston County for the past thirty-one years.
2. For a period of thirty years next preceding the return of the indictment in this cause only two negroes have served as grand jurors in Galveston County.
3. The grand jury that indicted the defendant in this cause consisted of twelve white men.

Other stipulations bearing upon the question include the following: "that in so far as the selection, drawing and summoning of petit or trial juries are concerned there is not now and has not been for many years any discrimination against negroes in Galveston County."

The stipulation indicates that two negroes had served as grand jurors in Galveston County. The exact time of their selection is not shown.

If selected at the previous term or at a recent term, an abandonment of the practice of excluding negroes, rather than the existence of discrimination might well be inferred.

The question raised in this motion has received the close attention and study of all members of this court, and it would serve no useful purpose to write further upon it.

[fols. 286-289] We cannot agree that the personnel of the jury commission, regardless of their race, is of consequence —their sole function is to select the members of the grand jury panel.

Should they select an all negro panel, certainly it could not be urged that a conviction of a negro accused must be set aside because the commission was composed only of whites.

If there be no discrimination in the selection of the grand jurors, appellant has no basis for complaint.

We remain convinced that the trial court properly overruled appellant's motion to quash the indictment upon his finding that discrimination in the selection of the grand jury was not shown.

Furthermore, he having received a fair and impartial trial before a trial jury selected admittedly without discrimination, we think appellant's constitutional rights were not violated.

The motion for rehearing is overruled.

Woodley, Judge.

(Delivered October 25, 1950.)

Opinion approved by the Court.

[fol. 290] SUPREME COURT OF THE UNITED STATES, OCTOBER TERM, 1950

No. 364-Misc.

On petition for writ of Certiorari to the Court of Criminal Appeals of the State of Texas.

ORDER GRANTING MOTION FOR LEAVE TO PROCEED IN FORMA PAUPERIS; GRANTING PETITION FOR WRIT OF CERTIORARI ETC.—March 12, 1951

On consideration of the motion for leave to proceed herein *in forma pauperis* and of the petition for writ of certiorari, it is ordered by this Court that the motion to proceed *in forma pauperis* be, and the same is hereby, granted; and that the petition for writ of certiorari be, and the same is hereby granted. The case is transferred to the appellate docket as No. 600 and placed on the summary docket.

It is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.

Office - Supreme Court
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CHARLES ELMORE CR

IN THE

Supreme Court of the United States

OCTOBER TERM, 1950

No. 600 ~~264, Miscellaneous~~

HERMAN LEE ROSS,
Petitioner

v.

STATE OF TEXAS,
Respondent

BRIEF OF RESPONDENT IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

PRICE DANIEL
Attorney General of Texas

CHARLES D. MATHEWS
First Assistant
Attorney General

E. JACOBSON
Assistant Attorney General

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1950

No. 364, Miscellaneous

HERMAN LEE ROSS,
Petitioner

v.

STATE OF TEXAS,
Respondent

BRIEF OF RESPONDENT IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

PRELIMINARY STATEMENT

Petitioner, Herman Lee Ross, a Negro, was indicted and tried for murder in the District Court for Galveston County, Texas. He was found guilty and the death penalty was recommended by the jury after the introduction of evidence which Petitioner does not contend was insufficient to sustain the verdict.[1]

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[1] Because this appeal is *in forma pauperis*, and in the interest of brevity, Respondent did not object to the preparation of a transcript to this Court which omitted the portion dealing with the facts of the crime involved. Petitioner was found guilty of shooting Guido Nesti, the keeper of a package store, during the perpetration of a robbery

Petitioner filed a motion to quash the indictment on the ground that he was denied the equal protection of laws and due process of the law guaranteed by the 14th Amendment to the United States Constitution. As grounds for these contentions Petitioner alleged in his motion that only two Negroes have served as grand jurors in Galveston County in the thirty years preceding Petitioner's indictment and that no Negro served on the grand jury which indicted the Petitioner (Tr. 11-12). No testimony was produced in support of the motion to quash, but counsel for the State and for Petitioner entered into a stipulation as to the facts which would be used to review and determine the merits of the motion.[2] The motion to quash was overruled by the trial court (Tr. 15).

Appeal was taken to the Texas Court of Criminal Appeals, the court of last resort in criminal matters.

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and while the victim was standing with his hands upraised. At the time he was arrested, Petitioner shot at the arresting officers and severely injured two of them. In its opinion the Texas Court of Criminal Appeals stated:

> "The facts of this case show without dispute a murder for the purpose of perpetrating a robbery. The appellant is a negro, his victim a white man, an Italian by birth. In addition to the circumstances of the crime, appellant's own witness placed on the stand by his attorney to testify in his behalf, Dr. E. A. Etter, testified that he had known appellant all of his life; that he had long been a sufferer from tuberculosis and syphilis; that: 'He had been an outcast, a waif of society, * * *.' He said that appellant had a tendency to kill and wanted to kill, and that he had never mixed with society or made any contribution to it." *Ross v. State*, 233 S. W. 2d 126 (1950, not yet officially reported).

[2] This "Stipulation of Fact" is set out as an appendix to the Petition for Certiorari in this cause.

That court affirmed the conviction and the action of the trial court in overruling the motion to quash the indictment.[3]

The single point raised by the petition for certiorari is that it was error for the Texas court to affirm the conviction since Petitioner is a Negro and "no Negroes were called for grand jury service in the instance case."

STATEMENT OF THE CASE

The method of selection of grand jurors, as provided by the Constitution and statutes of Texas,[4] has recently been reviewed by this Court and its validity accepted.[5]

Petitioner does not now attack the validity of this method of selection. The stipulation between counsel for the State and Petitioner contains several par-

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[3] *Ross v. State*, 233 S. W. 2d 126 (1950, not yet officially reported). In its original opinion the Texas Court of Criminal Appeals reversed the judgment of the Trial Court and dismissed the prosecution. On motion for rehearing by the State, the Court set aside its original opinion and affirmed the judgment of the trial Court, stating: "It is our judgment that this appellant has received a fair and impartial trial as he admits, and thus believing, the State's motion for a rehearing is granted, the order of reversal is set aside, and the judgment is now affirmed." As an appendix to the Petition for Certiorari, Petitioner has attached only the original opinion of the Texas Court, the dissent, and the opinion on Petitioner's Motion for Rehearing after the Court had set aside its original opinion.

[4] Section 13, Article V and Section 19, Article XVI, Texas Constitution; Articles 333, 335, 336, 338, 339, 340, and 344, Texas Code of Criminal Procedure (Vernon, 1948). These constitutional and statutory provisions are set out in the Appendix at pages 15 to 18.

[5] *Akins v. Texas*, 325 U.S. 398 (1945); *Cassell v. Texas*, 339 U.S. 282 (1950).

agraphs which are pertinent to the points to be raised in this reply and which set out the background upon which this case must be decided.

Since the "Stipulation of Fact" in this cause is set out in its entirety as an appendix to the petition for certiorari, only those paragraphs which are pertinent to the argument to be made in this reply and which, it is felt, sufficiently state the facts of the case will be set out in this reply. They are:

5.

"For a period of 30 years next preceding the return of the indictment in this cause only two Negroes have served as grand jurors in Galveston County."

6.

"The grand jury that indicted defendant in this cause consisted of 12 white men."

8.

"In the selection of petit or trial juries Galveston County is now and for many years has been governed by Articles 2094-2095, R.C.S. of Texas, which statutes are made a part hereof by reference known as the Jury Wheel Law. . . ."

9.

"The defendant makes no contention that any discrimination is now or has ever been practiced in Galveston County against the placing in the jury wheel of the names of all Negroes residing in the county whose names appear on the tax lists. Defendant agrees that

the names of all Negroes residing in Galveston County whose names appeared on the tax rolls on the first of August preceding the return of the indictment in the instant case were placed in the jury wheel as required by law."

11.

"In short, it is agreed that in so far as the selection, drawing and summoning of petit or trial juries are concerned there is not now and has not been for many years any discrimination against Negroes in Galveston County."

13.

"Of the panel drawn for the trial of the defendant 82 men appeared and qualified of which number, 13 were Negroes, being approximately fiiteen (15%) per cent. Seven Negroes were examined before the jury to try defendant was completed. Of these seven, four were peremptorily challenged by the State, one was excused by the Court because of sickness and two were challenged for cause, because opposed to capital punishment. When the jury of twelve were completed, there remained six Negroes on the unexamined panel. Defendant used twelve peremptory challenges, the State used six."

14.

"That after the return of the indictment in the instant case, to-wit: the December, 1948 grand jury, two Negroes were appointed, and served; on the February, 1949 grand jury, one Negro was selected by the Commissioners but claimed his legal exemption because of being a practicing physician."

It is thus seen that in the selection of grand juries in Galveston County in the 30 years preceding the indictment of Petitioner, two Negroes served as grand jurors. There is no indication in the stipulation as to when these two Negroes served, hence it may well be that there was one Negro on each of the last two grand juries preceding that which indicted Petitioner, or it may be that there were two Negroes on the last grand jury prior to the one which returned the indictment in this cause. It is stipulated that no Negro served upon the grand jury which indicted Petitioner; however, two Negroes served upon the next grand jury and one Negro was called for the grand jury following but asked to be excused.

It is stipulated that there is no discrimination against Negroes in the selection of trial juries in Galveston County. In other words, Petitioner's contention is that there is discrimination in the selection of grand juries but no discrimination in the selection of the juries which try the cases and decide upon the guilt or innocence of the accused, and his conviction should be reversed. Indeed, in the trial jury which participated in the case against the Petitioner, there were six Negroes upon the unexamined panel after the jury was selected. Petitioner used only 12 of his 15 peremptory challenges, hence Petitioner could have, had he desired, challenged three of the white jurors in an attempt to secure Negroes upon the trial jury.

POINT ONE

There being no intentional or systematic exclusion of Negroes in the selection of the trial jury which

found Petitioner guilty, the lack of Negroes upon the grand jury, whose function is merely the returning of an indictment, is harmless error.

Argument and Authorities

It is well established that the use of a grand jury is optional with the several States and that indictment by grand jury may be abolished and indictment by information or complaint substituted.[6] The Texas Court of Criminal Appeals took judicial knowledge of the fact that

> "We have known of none ever having held such position [county attorney] in our memory save white persons. All judges since the days of the Reconstruction, as well as Justices of the Peace, and also Legislators, have been white persons; and it is only left as a matter of speculation how far the deeds of our fathers shall be the basis of an assumption of misdeeds for the present generation." (233 S.W. 2d 126, 131.)

Thus, should Texas abolish the grand jury and establish a procedure in felony cases of commencement by information issued by a magistrate, justice of the peace, judge, or whoever shall be denominated the issuing officer, the question of discrimination against Negroes in the selection of those elected officials would not arise. This would be true even though the persons who hold the office from which the information or complaint is issued would in each case be a member of the white race.

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[6] *Hurtado v. California*, 110 U.S. 516 (1883).

A grand jury in Texas has only one function. It may either return an indictment against a defendant or refuse to indict him. The duties of a Texas grand jury are set out in Article 381, Texas Code of Criminal Procedure, as follows:

> "The grand jury shall inquire into all offenses liable to indictment of which any member may have knowledge, or of which they shall be informed by the attorney representing the State, or any other credible person."

It is not incumbent upon the grand jury to hear the testimony of any witnesses other than those appearing for the prosecution. Based upon this evidence its sole function is to decide whether an indictment shall be presented. In the event of presentation of an indictment, no presumption is created as to the guilt of the accused. Indeed, the presumption of innocence continues throughout the trial and each element of the crime for which the accused has been indicted must be proved beyond reasonable doubt before a trial jury. On the other hand, should the grand jury decide that the accused has not committed the act which is brought to its attention, it can refuse to return an indictment, this being known in Texas as a "no bill."

An indictment is no evidence of guilt and cannot be so considered. It is a completely isolated incident from the trial itself, and is merely an antecedent step. In this regard, the grand jury is largely an arbitrary and autonomous body, granted the latitude to indict or not upon any quantity or quality of evidence. There is no jeopardy in a no bill and the

mere failure to indict does not act as a bar to the State's attorneys presenting the same evidence to other grand juries selected in the county. There being no statute of limitations on murder,[7] this would mean that in the instant case the prosecuting attorney of Galveston County could have attempted indefinitely to secure an indictment against the Petitioner. Even under the doctrine as established by this Court, it is entirely possible and highly probable, without successful contention of systematic exclusion or limitation, that in the future there will be a grand jury without a Negro serving.

Inherent in the cases decided by this Court is the assumption that Negroes, qualified to serve as grand jurors, would not return an indictment against an accused simply because the accused was also a Negro, even though the same evidence would lead a qualified white man or twelve qualified persons of either race to either indict or find the accused guilty of the crime as charged. This, it is contended, is an unreasonable assumption. But even with this assumption, the State's attorney could overcome this bar by waiting for a grand jury composed entirely of white persons.[8] However, even under the present grand jury system in Texas it is not necessary that all the members of a grand jury vote to indict. The Texas statutes provide that nine members of a grand jury may

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[7] Article 180, Texas Code of Criminal Procedure (Vernon, 1948). Appendix, page 15.

[8] Gibson, *Racial Discrimination on Grand Juries*, 3 Baylor L. Rev. 29 (1950). The author of this article is Assistant County Attorney of Galveston County, the county where this case was tried.

indict.[9] Thus, assuming the correctness of the Court's assumption, and assuming that members of the Negro race served upon every grand jury, it would not necessarily mean that the grand jury would be compelled to refuse to return an indictment against a member of the Negro race.

These propositions, when coupled with the fact that all the members of a trial jury must vote for conviction, and only nine members of a grand jury need join in an indictment, serve to fortify the proposition that the absence of a Negro from the grand jury which indicted Petitioner was harmless error in view of the complete lack of discrimination over a long period of time in the selection of trial juries. The holdings of the Texas courts in the instant case were based mainly upon the same propositions as those presented in the dissent of Mr. Justice Jackson in *Cassell v. Texas*, 339 U.S. 281 (1950). In the *Cassell* case there was no stipulation such as in this case that "in . . . the selection . . . of petit or trial juries . . . there is not now and has not been for many years any discrimination against Negroes in Galveston County." It is respectfully urged that this Court, in the light of the stipulation in this case, consider the effect of the absence of a Negro from the indicting grand jury upon the end result of the complete trial procedure. Certainly no beneficial purpose will be served by reversing the conviction of the Petitioner in this case, making it incumbent upon the State to reindict and retry one who was convicted at what is admittedly

[9] Articles 391 and 393, Texas Code of Criminal Procedure (Vernon, 1948). Appendix, page 18.

a fair trial. Should there be indicated in the present record a policy or custom of intentional and systematic exclusion of Negroes from grand jury service, the abuse could best be corrected, as stated by Mr. Justice Jackson, in the enforcement of the existing Federal penal statutes.

POINT TWO

The practice, if any, of excluding Negroes from grand jury service having been discontinued prior to the selection of the grand jury which indicted Petitioner, absence of Negroes from the grand jury returning the indictment in this cause does not constitute a denial of the equal protection of laws.

Argument and Authorities

An attempt to review in any detail the law concerning discrimination against Negroes in the selection of grand juries is unnecessary in virtue of the familiarity of this Court with the law concerning that subject. Briefly stated, this Court has held that a mixed jury in each case is not required by the equal protection clause of the 14th Amendment.[10] It re-

[10] *Martin v. Texas*, 200 U.S. 316, 320 (1906): "A different conclusion in this case would mean that, in a criminal prosecution of a negro for crime, an allegation of discrimination against the African race, because of their race, could be established by simply proving that no one of that race was on the grand jury that returned the indictment or on the petit jury that tried the accused; whereas, a mixed jury, some of which shall be of the same race with the accused, cannot be demanded, as of right, in any case, nor is a jury of that character guaranteed by the Fourteenth Amendment. . . ."

Snowden v. Hughes, 321 U.S. 1, 8 (1944): ". . . But a discriminatory purpose is not presumed . . .; there must

quires only that there be no intentional and systematic exclusion of Negroes from grand jury service solely because of race.[11] Systematic exclusion may be shown by a long continued exclusion of Negroes from grand jury service.[12]

The stipulation in this case is to the effect that two Negroes had served upon the grand juries of Galveston County in the 30 years preceding the selection of the grand jury which indicted Petitioner. It is also shown in the stipulation that Negroes have served or have been called upon the grand juries following that which indicted the Petitioner. Petitioner points out in his Motion for Rehearing in the Texas Court of Criminal Appeals that a Negro was appointed as Jury Commissioner in Galveston County and three Negroes served on the grand jury for the June Term, 1950.[13] There is nothing contained in the stipulation or in the record which would indicate which juries contained the two Negroes who, it is stipulated, served during the 30-year period. Based upon the presumption that the officials of a State or county will carry out their duties in a legal manner[14] and the stipulation in this record, Galveston County discontinued in recent

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be a showing of 'clear and intentional discrimination' . . . But a mere showing that Negroes were not included in a particular jury is not enough; there must be a showing of actual discrimination because of race."

[11] *Ibid.*

[12] *Patton v. Mississippi*, 332 U.S. 463 (1948); *Pierre v. Louisiana*, 306 U.S. 354 (1939); *Norris v. Alabama*, 294 U.S. 587 (1935).

[13] Defendant's Motion For Rehearing in the Court of Criminal Appeals of Texas, p. 6.

[14] *Akins v. Texas, supra; Martin v. Texas, supra.*

years its practice of excluding Negroes from grand jury service.

This being true, the cases which hold that a showing of long continued absence of Negroes from grand juries creates a prima facie showing of intentional and systematic exclusion of Negroes from grand jury service are not applicable here. Certainly there is some time when a county can change its policy, and upon such a change the past acts of that county will no longer cast a stigma upon its future acts. This Court has indicated that it will accept some intermediate point as a beginning point for its determination as to the existence of a custom of exclusion.[15]

Thus, commencing with two grand juries prior to that which indicted Petitioner and with the exception of that particular grand jury, there have been from one to three Negroes on each grand jury up to June, 1950, the latest indicated in this record. There has also been a Negro Jury Commissioner in Galveston County. This clearly indicates an abandonment of any practice or custom which might have existed in the past and certainly does not leave the grand jury which indicted Petitioner tainted by any intentional or systematic exclusion of Negroes. There is no evidence that there was any element of intentional exclusion of Negroes from the grand jury which presented the indictment against Petitioner. Indeed, there is no evidence at all with regard to the selection of this grand jury. Absent a *prima facie* showing based upon past events, Petitioner's contentions must fall.

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[15] *Cassell v. Texas, supra; Akins v. Texas, supra.*

CONCLUSION

It is respectfully submitted that this case is not a proper one for review by this Court and that the petition for writ of certiorari should be denied.

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APPENDIX

Constitutional and Statutory Provisions of Texas

Constitutional Provisions

Article V Section 13: "Grand and petit juries in the District Courts shall be composed of twelve men; but nine members of a grand jury shall be a quorum to transact business and present bills. In trials of civil cases, and in trials of criminal cases below the grade of felony in the District Courts, nine members of the jury, concurring, may render a verdict, but when the verdict shall be rendered by less than the whole number, it shall be signed by every member of the jury concurring in it. When, pending the trial of any case, one or more jurors not exceeding three, may die, or be disabled from sitting, the remainder of the jury shall have the power to render the verdict; provided, that the Legislature may change or modify the rule authorizing less than the whole number of the jury to render a verdict."

Article XVI Section 19: "The Legislature shall prescribe by law the qualification of grand and petit jurors."

Statutory Provisions[16]

Article 180: "An indictment for any other felony may be presented within three years from the commission of the offense, and not afterward; except murder, for which an indictment may be presented at any time."

Article 333: "The district judge shall, at each term of the district court, appoint three persons to

[16] Texas Code of Criminal Procedure (Vernon, 1948).

perform the duties of jury commissioners, who shall possess the following qualifications:

1. Be intelligent citizens of the county and able to read and write.
2. Be qualified jurors and freeholders in the county.
3. Be residents of different portions of the county.
4. Have no suit in said court which requires the intervention of a jury."

Article 335: "When the appointees appear before the judge, he shall administer to them the following oath: 'You do swear faithfully to discharge the duties required of you as jury commissioners; that you will not knowingly elect any man as juryman whom you believe to be unfit and not qualified; that you will not make known to any one the name of any juryman selected by you and reported to the court; that you will not, directly or indirectly, converse with any one selected by you as a juryman concerning the merits of any case to be tried at the next term of this court, until after said cause may be tried or continued, or the jury discharged."

Article 336: "The jury commissioners, after they have been organized and sworn, shall be instructed by the judge in their duties and shall then retire in charge of the sheriff to a suitable room to be secured by the sheriff for that purpose. The clerk shall furnish them the necessary stationery, the names of those appearing from the records of the court to be exempt or disqualified from serving on the jury at each term, and the last assessment roll of the county."

Article 338: "The jury commissioners shall select sixteen men from the citizens of the different portions of the county to be summoned as grand jurors for the next term of the court."

Article 339: "No person shall be selected or serve as a grand juror who does not possess the following qualifications:

1. He must be a citizen of the State, and of the county in which he is to serve, and qualified under the Constitution and laws to vote in said county; but, whenever it shall be made to appear to the court that the requisite number of jurors who have paid their poll taxes can not be found within the county, the court shall not regard the payment of poll taxes as a qualification for service as a juror.
2. He must be a freeholder within the State, or a householder within the county.
3. He must be of sound mind and good moral character.
4. He must be able to read and write.
5. He must not have been convicted of any felony.
6. He must not be under indictment or other legal accusation for theft or of any felony."

Article 340: "The names of those selected as grand jurors by the commissioners shall be written upon a paper; and the fact that they were so selected shall be certified and signed by the jury commissioners, who shall place said paper, so certified and signed, in an envelope, and seal the same, and indorse thereon the words, 'The list of grand jurors selected at ..... term of the district court,' the blank being for the month and year in which the term of the court began its session. The commis-

sioners shall write their names across the seal of said envelope, direct the same to the district judge and deliver it to him in open court."

Article 344: "Within thirty days of the next term of the district court and not before, the clerk shall open the envelope containing the list of grand jurors, make out a copy of the names of those selected as grand jurors, certify to it under his official seal and deliver it to the sheriff."

Article 391: "After all the testimony which is accessible to the grand jury shall have been given in respect to any criminal accusation, the vote shall be taken as to the presentment of an indictment, and, if nine members concur in finding the bill, the foreman shall make a memorandum of the same with such data as will enable the attorney who represents the State to write the indictment."

Article 393: "When the indictment is ready to be presented, the grand jury shall go in a body into open court, and, through their foreman, deliver the indictment to the judge of the court. At least nine members of the grand jury must be presented on such occasion."

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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1950

No. 600

HERMAN LEE ROSS, *Petitioner*

vs.

STATE OF TEXAS *Respondent*

BRIEF FOR PETITIONER

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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1950

No. 600

HERMAN LEE ROSS,

Petitioner

vs.

STATE OF TEXAS

Respondent

BRIEF FOR PETITIONER

Statement of the Case

The Petitioner, Herman Lee Ross, a Negro, was charged by Indictment in the District Court of Galveston County, Texas, with the offense of murder, but prior to his trial a sanity hearing was had and the Defendant was found to be sane; thereafter the Defendant prior to a trial upon the merits, seasonably filed a Motion to quash the Indictment on the ground that the Defendant had been denied due process of law and equal protection of the law as guaranteed to him by the Fourteenth Amendment to the Constitution of the United States, and that for a period of thirty years prior to the Indictment in the *Ross* case, no Negro or person of African descent had been appointed

Grand Jury Commissioner in Galveston County, Texas, and only twice in thirty years prior to such Indictment had a Negro served as a member of the Grand Jury in Galveston County, Texas, and the last time was about ten years prior to the time of Indictment in this case; that the Federal Census for 1940, showed that the population of Galveston County, was 81173 and that of this number 17712 were members of the Negro Race or more than 21% of the total population, the Grand Jury that indicted the Defendant in this cause, consisted of twelve white men. For the purpose of keeping the record straight it will be observed from the Opinion of the Court of Criminal Appeals of Texas 233 S.W. (2d) 126, and also from the Brief of the State of Texas, that reference was made that Guido Nesti was killed by the Defendant in the preparation or perpetration of a robbery.

But there isn't a scintilla of evidence in the record to support such statement. There is also reference to the testimony of Dr. E. A. Etter in both the Opinion of the Court of Criminal Appeals and the Brief of the State of Texas, to the effect: "That Dr. Etter testified that he had known Appellant all of his life; that he had long been a sufferer from tuberculosis and syphilis; that he has been an outcast; a waif of society, he said that Appellant had a tendency to kill, and that he had never mixed with society or made any contribution to it.

The above testimony was introduced upon the sanity hearing in a separate and distinct case, was not incorporated in the Statement of Facts in the Trial Court; should not have referred to in the Opinion of the Court of Criminal Appeals, it should not be incorporated in the State's Brief and should not be in this Brief, but it is so incorporated merely for the purpose of trying to keep the record straight.

This Honorable Court will also find in the Opinion of the Court of Criminal Appeals of Texas, and in the State's Brief in this case, a statement to the effect: "That insofar as the selection, drawing and summoning of Petit Jurors are concerned, there is not now and has not been for many years any discrimination practiced in Galveston County, against Negroes." In Galveston County, the names of men, Poll Tax payers, are placed in a box and when a certain number of Jurors are needed the District Clerk, the County Clerk, the Tax Assessor, the Sheriff and the District Judge, (they are the only people who are present at such time), are supposed to draw the names out of the wheel without any discrimination, but whether this is actually done or not no one knows except the Parties named, no proof was offered on this. If it appears to this Court that Counsel for the Defendant admitted that there was no discrimination shown it was meant that no discrimination was shown in drawing the names from the jury wheel. If it appears to this Court from the Stipulation of Facts, from the Opinion of the Court of Criminal Appeals and from the Brief of the State of Texas, that Counsel for Defendant admitted that no discrimination was shown in the selection of Trial Jurors, such is a gross misquotation of the agreement and a misunderstanding of the meaning of the Stipulation.

In Capital cases the State and the Defendant each have fifteen peremptory challenges, but for twenty-five years to the knowledge of the writer the State's Attorney has saved his peremptory challenges to use on Negroes, and that was done in this case.

Prejudice and discrimination is always shown in the selection of Trial Jurors when they are being examined in open Court to serve upon a particular case.

After the Motion to quash was overruled and the Indictment was read to the Jury, the Defendant pleaded not guilty and also pleaded insanity. The Defendant did not testify in the case. He was found guilty of murder and the death penalty was assessed.

An Appeal was duly taken to the Court of Criminal Appeals of the State of Texas, and on April 19th, 1950, the Court of Criminal Appeals reversed the judgment of the Trial Court and ordered the prosecution dismissed, but on the State's Motion for rehearing the Court of Criminal Appeals reversed itself and affirmed the Judgment of the Trial Court.

Judge Graves of the Court of Criminal Appeals of Texas, wrote a Dissenting Opinion in the language of Mr. Justice Jackson in *Cassell* v. *The State of Texas,* in 70 S. Ct. 629, it appears that the Court of Criminal Appeals of Texas, decided to follow the Dissenting Opinion of Mr. Justice Jackson, instead of the majority opinion.

The Defendant filed an Application for a Stay of Execution in the Supreme Court of the United States and thereafter he filed a Petition for a Writ of Certiorari in the Supreme Court of the United States, and this case is now before this Court.

POINT ONE

The Court of Criminal Appeals for The State of Texas erred in affirming the Judgment and sentence of the Trial Court in that the Motion of Petitioner to quash the Indictment should have been sustained where the record reflected that for thirty years next preceding the Indictment in the Ross case, no Negro was appointed Grand Jury Commissioner in Galveston County, Texas, and that for a period of thirty years next preceding the Indictment in the Ross case, only two Negroes served as Grand Jurors; Petitioner being a Negro and therefor denied equal protection under the Constitution of the United States and particularly the fourteenth Amendment thereto.

Argument and Authorities

In *Smith* v. *The State of Texas,* 61 S. Ct. 164, Edgar Smith was convicted of rape, the conviction was affirmed by the Court of Criminal Appeals of the State of Texas, 136 S.W. (2d) 842, and the Defendant filed a Petition for Writ of Certiorari in the Supreme Court of the United States, this case was reversed. It was held by this Court: "Where Negroes are intentionally and systematically excluded from Grand Jury service solely on account of race and color a conviction of a Negro based upon an Indictment returned by a Grand Jury so selected, is a denial of equal protection of law." "The fact that the written words of a State's Laws hold out a promise that no racial discrimination will not be practiced is not enough, since the Fourteenth Amendment requires that equal protection to all must be given, not merely promised." If this Court will read Article 333-357, of the Code of Criminal Procedure of Texas, which relates to the selection of Grand Juries there is nothing apparent from the reading of the Statute

itself to show discrimination, but in all of the cases from *Neal* v. *The State of Delaware*, 103 U.S. 370, to *Cassell* v. *The State of Texas*, 70 S. Ct. 629; 339 U.S. 282, it has been held by this Court that where no Negro has served on the Grand Jury for a long period of time and especially where there were a number of qualified Negroes in the County, the mere fact of their exclusion establishes discrimination as a matter of law.

The District Court of Galveston County, appoints Grand Jury Commissioners, for the past thirty years, such Commissioners have all been White. In the S.Ct. decisions between *Neal* v. *State of Delaware* (supra) and *Cassell* v. *The State of Texas* (supra) the questioning of Grand Jury Commissioners disclosed that they never selected Negroes to serve on a Grand Jury because they were not personally acquainted with any Negroes with the qualifications of Grand Jurors; that may be true, but this Court has held in *Hill* v. *The State of Texas*, 62 S.Ct. 1159: "Where there are qualified Negroes available for Jury service, exclusion by Jury Commissioner of all Negroes whom they do not know to be qualified, without either knowing or seeking to learn whether there are in fact any Negroes qualified to serve, constitutes discrimination, in violation of the equal protection of law's provision of the United States Constitution." If the District Judge in Galveston County, will appoint a Negro as Grand Jury Commissioner, the Commissioners appointed will know a lot of Negroes with the qualification not only to serve as Grand Jurors and as Trial Jurors, but even qualified to serve on the Supreme Court. In *Carter* v. *Texas*, 177 U.S. 442, it was held: "whenever by any action of the State, whether through its Legislature, through its Courts, or through its Executive or Administrative offices all persons of the African Race are excluded solely because of Race or color from serving as Grand

Jurors in the criminal prosecution of a person of the African Race, the equal protection of the laws is denied to him contrary to the Fourteenth Amendment to the Constitution of the United States. *(Carter* v. *Texas* is a case that was carried to this Court from Galveston County.) In *Norris* v. *The State of Alabama*, 55 S.Ct. 579 (Scottsboro case): "This Court held action of The State through Legislature, Courts or Executive or Administrative offices in excluding all Negroes solely because of race or color, from serving as Grand or Petit Jurors in criminal prosecutions against Negroes, denies equal protection contrary to the Fourteenth Amendment to the Constitution of the United States.

Paragraph four of the Stipulations is as follows: "No Negro has ever served or been selected to serve as a Grand Jury Commissioner in Galveston County, for the past thirty years." On the above facts we take the position that Grand Jury Commissioners are Judicial, Executive and Administrative Officers of the State of Texas, and that Negroes are entitled to serve as such Commissioner and at least one should have served in thirty years; that such stipulation of fact alone constitutes discrimination as a matter of law and is repugnant to the Fourteenth Amendment to the Constitution of the United States and the laws made in persuance thereof. In *Norris* v. *State of Alabama* (supra): Evidence adduced by Negro Defendant in criminal cases that for a generation or longer, no Negro had been called for service in the State Court on any Grand or Petit Jury within the County, made a prima facie case of denial of equal protection guaranteed by the Fourteenth Amendment to the Constitution of the United States.

We also take the position that Negroes possessing the qualifications are entitled to serve as Grand Jury Commissioners, as Grand Jurors and as Petit Jurors, but that from

the Stipulations it is patently apparent that for a long period of time, Negroes have been systematically excluded from serving in the above capacities, by the State of Texas over a long period of time.

Point Two

The Judgment and sentence of the Trial Court and the affirmance thereof by the Court of Criminal Appeals for the State of Texas, was and is contrary to law and violative of the constitutional rights of Petitioner and where no Negro has served as Grand Jury Commissioner in Galveston County, for the past thirty years, discrimination is shown as a matter of law; the Petitioner himself being a Negro.

Argument and Authorities

Article 333, C.C.P. of Texas, 1948, provides for the appointment of Jury Commissioners and also defines their qualifications; they are: 1. Be intelligent citizens of the County and able to read and write. 2. Be qualified Jurors and freeholders in the County. 3. Be residents of different portions of the County. 4. Have no suit in said Court which requires the intervention of a Jury. 5. The same person shall not act as Jury Commissioner more than once in the same year. From the qualifications of Grand Jury Commissioners as set out in the Statute above quoted, it is obvious to anyone who knows anything about the American Negro, that the average Negro who pays his Poll Tax in Texas, is qualified to serve in the capacity as Grand Jury Commissioner.

Yet for a period of thirty years in Galveston County, Texas, where more than twenty-one percent of the total population is of the Negro Race, no Negro has been appointed Grand Jury Commissioner by the Judge of the District Court.

The Grand Jury Commissioners are Judicial, Executive or Administrative officers of the State, and if for a period of thirty years all of such Commissioners were White, then if the American Negro has not been systematically excluded from such service in violation of the due Process Clause and Equal Protection Clause of the Fourteenth Amendment to the Constitution of the United States, as well as in violation of a rule of the Supreme Court of the United States beginning with the old cases of *Neal* v. *The State of Delaware,* 103 U.S. 370; *Strauder* v. *The State of West Virginia,* 100 U.S. 303; 25 S.E. d. 664, and a long line of cases, then there is no such thing as systematic exclusion as a matter of law.

Article 338, C.C.P. of Texas, 1948, provides that the Jury Commissioner shall select sixteen men from the citizens of the different portions of the County, to be summoned as Grand Jurors for the next term of the Court.

The qualifications of Grand Jurors are: 1. He must be a citizen of the State, and of the County in which he is to serve, and qualified under the Statutes and Laws to vote in said County; but whenever it shall be made to appear to The Court that the requisite approved Jurors should have paid their Poll Taxes cannot be found within the County, The Court shall not regard the payment of Poll Taxes as a qualification for service as a Juror. 2. He must be a freeholder within the State, or a householder within the County. 3. He must be of sound mind and good moral character. 4. He must be able to read and write. 5. He must not have been convicted of any felony. 6. He must not be under Indictment or other legal accusation for theft or of any felony.

It is the exception rather than the rule to find an adult male Negro in Galveston County, Texas, who cannot meet the qualifications of a Grand Juror.

I come now to the case of *Ross* v. *The State of Texas*, 233 S.W. 126, (this is the case now before this Court), Judge Beauchamp, of the Court of Criminal Appeals of Texas, in writing the Opinion on the 19th of April, 1950, after citing *Pierre* v. *The State of Louisiana*, 59 S.Ct. 536; *Smith* v. *Texas*, 61 S. Ct. 164, *Hill* v. *Texas*, 62 S. Ct. 1159, said: "The facts in the two Texas cases are so similar to those shown in the agreed statement in the present record, that no reasonable ground can be discovered why the holding of the Supreme Court of the United States in the Smith and Hill cases would not be followed by that Court." "We must recognize the holdings of the Supreme Court of the United States in cases so very similar that they cannot be distinguished from that now before us. Galveston County with several thousand Negro voters has had two Negroes on Grand Juries during the past thirty years. This showing will not satisfy the Court that has definitely and positively expressed its views on the question of discrimination in the Authorities cited."

We take the position that Judge Beauchamp, of our Court of Criminal Appeals, wrote correctly and followed the Rule of Law as laid down by the Supreme Court of the United States.

On the State's Motion for rehearing in the *Ross* case, Judge Graves, of our Court of Criminal Appeals, said: "A sound mind and good moral character being a fair requisite for a Grand Juror in Texas; acquaintanceship at least with the individual should be required, especially on the ground of good moral character, such being not a matter of reputation, but of knowledge. It becomes difficult to see how a Commissioner could adhere to such an admonition unless he knew the desired person and was familiar, not only with his reputation, but also with his moral character, and his record as a citizen." I agree with Judge Graves that it is

difficult for a White Grand Jury Commissioner in Texas, to know Negroes who have the qualifications of Grand Jurors, because the contact between the races is of such nature as to prevent first hand knowledge, but if the District Court will appoint a Negro Grand Jury Commissioner, it will be very easy for him to point out and select Negroes with qualifications for Grand Jurors, because he associates with them, comes in contact with them constantly, and knows them personally. If we have Negro Grand Jury Commissioners they will know Negroes who are qualified under the Statute to serve as Grand Jurors, but for a period of thirty years in Galveston County, the District Court had not appointed one Negro as Grand Jury Commissioner; perhaps he did not know any who had the qualifications, but this Court has repeatedly held that it is the duty of the Grand Jury Commissioner to find out whether or not there are any Negroes in the County, qualified for Grand Jury Service; it was so held in *Hill* v. *The State of Texas*, 62 S. Ct. 1159. Chance or accident could hardly have accounted for the continuous omission of Negroes from the Grand Jury Commission in Galveston County, for a period of thirty years.

Where the names of all male Poll Tax Payers are placed in the Jury Wheel as directed by the Statute, and if they are drawn out as so directed, it is absolutely and positively impossible to draw only two names with Negroes out of the wheel in a period of thirty years, in Galveston County.

In Paragraph 11, of the Stipulations, it is said: "In short it is agreed that insofar as the selection, drawing and summoning of Petit or Trial Jurors are concerned, there is not now and has not been for many years any discrimination against Negroes in Galveston County." It appears from the Stipulation just quoted that there is no discrimination against Negroes in Galveston County, with respect to

Trial Juries, but such is preposterous; the common sense of the slightest informed person would revolt at such. My understanding of that Stipulation was that there was no discrimination in the manner in which the Negroes' names were drawn out of the Jury Wheel, but the Court House is rife with racial prejudice and discrimination when prospective Jurors of color are examined for the trial of a case.

In Smith v. *Texas,* 61 S.Ct. 164, it is held: "The Texas Statute providing for selection of Grand Juries is not in itself unfair and is capable of being carried out without racial discrimination." It is customary in Galveston County, when citizens are being examined for service as a Trial Juror for the State's Attorney to use and exercise his peremptory challenges on Negroes. Attention is called to what Mr. Justice Black said speaking for the Supreme Court of the United States: "Here the Texas Statutory scheme is not in itself unfair; it is capable of being carried out with no racial discrimination whatsoever. (Articles 333-350, C.C.P. of Texas.) But by reason of the wide discretion permissible in the various steps of the plan it is equally capable of being applied in such a manner as practically to proscribe any group thought by the law's administrators to be undesirable, and from the record before us the conclusion is inescapable that it is the latter application that is prevalent in Harris (Galveston) County, Texas. With respect to serving as Grand Jury Commissioners, as Grand Jurors and as Petit Jurors in Galveston County, Texas, Negroes are like it was said about Cisalpine Gaul: "Hemmed in on all sides by the nature of the place."

The Fourteenth Amendment forbids any discrimination against a race in the selection of a Grand Jury. The burden is, of course, upon the Defendant to establish the discrimination. Defendants under our Criminal Statutes are not entitled to demand representatives of their racial inheritance

upon Juries before whom they are tried. But such Defendants are entitled to require that those who are trusted with Jury selection shall not pursue a course of conduct which results in discrimination in the selection of Jurors on racial grounds, *Akins* v. *The State of Texas*, 65 S. Ct. 1276; *Hill* v. *Texas*, 62 S. Ct. 1161.

4. The Stipulations provide no Negro has ever served or been selected to serve as a Grand Jury Commissioner in Galveston County, for the past thirty years.

5. For a period of thirty years next preceding the return of the Indictment in this cause, only two Negroes have served as Grand Jurors in Galveston County.

6. The Grand Jury that indicted Defendant in this cause, consisted of twelve White men.

The Defendant contends that the agreed facts stated in paragraphs 4, 5, and 6 of the Stipulations established systematic and arbitrary racial discrimination as a matter of law, and we believe that we have met the burden placed upon the Defendant.

Under Point One, of the State's Brief, it is vigorously argued that a Grand Jury in Texas is useless and unnecessary, but we still have Grand Juries in Texas, and with respect to such it has been held by the Supreme Court in *Pierre* v. *The State of Louisiana*, 59 S. Ct. 536: "Systematic exclusion of Negroes because of race from Grand Jury and Venire from which the Grand Jury is selected, constitutes a denial of equal protection of the laws contrary to the Federal Constitution." "In selection of Jury to pass on his life, liberty, or property, a Negro has a right that there shall be no exclusion of his race, and no discrimination against them because of their color."

When the Commissioners were appointed as judicial Administrative Officials in Galveston County, it was their

duty to familiarize themselves fairly with the qualifications of the eligible jurors of the County, without regard to race or color. Discrimination can arise from the action of commissioners who exclude all Negroes whom they do not know to be qualified, and who neither know nor seek to learn whether there are in fact any qualified Negroes to serve. In such a case discrimination necessarily results where there are qualified Negroes available for jury service.

If one factor is uniform in a continuing series of events that are brought to pass through human intervention, the law would have to have the blindness of indifference rather than the blindness of impartiality, not to attribute the uniform factor to man's purpose. The purpose may not be of evil intent or in conscious disregard of what is conceived to be a binding duty. Prohibited conduct may result from misconception of what duty requires.

In Galveston County, where more than twenty one per cent of the population is of the Negro race, could it happen by chance or accident, that for a period of thirty years no Negro was appointed Grand Jury Commissioner? Could it happen by chance or accident that only twice in a period of thirty years next preceding the *Ross* case, that only two Negroes could be selected to serve as Grand Jurors in Galveston County? We believe that the unexplained absence of Negroes from the Grand Jury over such a long period of time constitutes discrimination as a matter of law; *Cassell* v. *The State of Texas*, 70 S. Ct. 629.

Conclusion

It is respectfully submitted that the petition for a writ of certiorari should be granted and that the judgment of the Court of Criminal Appeals of the State of Texas affirming

the judgment of the District Court of Galveston County, should be reversed and the prosecution ordered dismissed.

Respectfully submitted,

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(3958)

Petition not printed

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1950

No. 600

HERMAN LEE ROSS,
Petitioner

v.

THE STATE OF TEXAS,
Respondent

On Writ of Certiorari to the Court of Criminal Appeals of the State of Texas

BRIEF FOR THE STATE OF TEXAS, RESPONDENT

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No. 600

HERMAN LEE ROSS,
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v.

THE STATE OF TEXAS,
Respondent

On Writ of Certiorari to the Court of Criminal Appeals of the State of Texas

BRIEF FOR THE STATE OF TEXAS, RESPONDENT

PRELIMINARY STATEMENT

Petitioner, Herman Lee Ross, a Negro, was indicted and tried for murder in the District Court for Galveston County, Texas. He was found guilty, and the death penalty was recommended by the jury after the introduction of evidence which Petitioner does not content was insufficient to sustain the verdict.[1]

[1] Because this appeal is *in forma pauperis*, and in the interest of brevity, Respondent did not object to the preparation of a Transcript of Record in this Court which omits the portion dealing with the facts of the crime. Petitioner was found guilty of shooting Guido Nesti, keeper of a package store, while the victim was standing with his hands upraised. At the time he was arrested, Petitioner shot at

Petitioner filed a motion to quash the indictment on the ground that he was denied the equal protection of laws and due process of the law guaranteed by the 14th Amendment to the United States Constitution. As grounds for these contentions Petitioner alleged in his motion that only two Negroes have served as grand jurors in Galveston County in the thirty years preceding Petitioner's indictment and that no Negro served on the grand jury which indicted the Petitioner. (R. 1-2.)[2] No testimony was produced in support of the motion to quash, but counsel for the State and for Petitioner entered into a stipulation as to the facts which would be used to review and determine the merits of the motion. (R. 4-8.) The motion to quash was overruled by the trial court.

Appeal was taken to the Texas Court of Criminal Appeals, the court of last resort in criminal matters. That court affirmed the conviction and the action of

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the arresting officers and severely injured two of them. In its opinion the Texas Court of Criminal Appeals stated:

> "The facts of this case show without dispute a murder for the purpose of perpetrating a robbery. The appellant is a negro, his victim a white man, an Italian by birth. In addition to the circumstances of the crime, appellant's own witness placed on the stand by his attorney to testify in his behalf, Dr. E. A. Etter, testified that he had known appellant all of his life; that he had long been a sufferer from tuberculosis and syphilis; that: 'He had been an outcast, a waif of society, * * *.' He said that appellant had a tendency to kill and wanted to kill, and that he had never mixed with society or made any contribution to it." (R. 9-10.)

[2] References throughout this brief are to the printed Transcript of Record dated March 31, 1951.

the trial court in overruling the motion to quash the indictment.[3]

The single point raised by the petition for certiorari is that it was error for the Texas court to affirm the conviction since Petitioner is a Negro and "no Negroes were called for grand jury service in the instance case."

STATEMENT OF THE CASE

The method of selection of grand jurors, as provided by the Constitution and statutes of Texas,[4] has recently been reviewed by this Court and its validity accepted.[5]

Petitioner does not now attack the validity of this method of selection. The stipulation between counsel for the State and Petitioner contains several paragraphs which are pertinent to the points to be raised in this reply and which set out the background upon which this case must be decided.

Since the "Stipulation of Fact" in this cause is

[3] *Ross v. State*, 233 S. W. 2d 126 (1950, not yet officially reported). In its original opinion the Texas Court of Criminal Appeals reversed the judgment of the Trial Court and dismissed the prosecution. (R. 8-10.) On motion for rehearing by the State, the Court set aside its original opinion and affirmed the judgment of the Trial Court, stating: "It is our judgment that this appellant has received a fair and impartial trial as he admits, and thus believing, the State's motion for a rehearing is granted, the order of reversal is set aside, and the judgment is now affirmed." (R. 13-20.)

[4] Section 13, Article V and Section 19, Article XVI, Texas Constitution; Articles 333, 335, 336, 338, 339, 340, and 344, Texas Code of Criminal Procedure (Vernon, 1948). These constitutional and statutory provisions are set out in the Appendix at pages 21 to 23.

[5] *Akins v. Texas*, 325 U.S. 398 (1945); *Cassell v. Texas*, 339 U.S. 282 (1950).

set out in its entirety in the printed Transcript of Record (R. 4-8.), only those paragraphs which are pertinent to the argument to be made in this brief and which, it is felt, state the material facts of the case will be here set out. They are:

5.

"For a period of 30 years next preceding the return of the indictment in this cause only two Negroes have served as grand jurors in Galveston County."

6.

"The grand jury that indicted defendant in this cause consisted of 12 white men."

8.

"In the selection of petit or trial juries Galveston County is now and for many years has been governed by Articles 2094-2095, R.C.S. of Texas, which statutes are made a part hereof by reference known as the Jury Wheel Law...."

9.

"The defendant makes no contention that any discrimination is now or has ever been practiced in Galveston County against the placing in the jury wheel of the names of all Negroes residing in the county whose names appear on the tax lists. Defendant agrees that the names of all Negroes residing in Galveston County whose names appeared on the tax rolls on the first of August preceding the return of the in-

dictment in the instant case were placed in the jury wheel as required by law."

11.

"In short, it is agreed that in so far as the selection, drawing and summoning of petit or trial juries are concerned there is not now and has not been for many years any discrimination against Negroes in Galveston County."

13.

"Of the panel drawn for the trial of the defendant 82 men appeared and qualified of which number, 13 were Negroes, being approximately fifteen (15%) per cent. Seven Negroes were examined before the jury to try defendant was completed. Of these seven, four were peremptorily challenged by the State, one was excused by the Court because of sickness and two were challenged for cause, because opposed to capital punishment. When the jury of twelve were completed, there remained six Negroes on the unexamined panel. Defendant used twelve peremptory challenges, the State used six."

14.

"That after the return of the indictment in the instant case, to-wit: the December, 1948 grand jury, two Negroes were appointed, and served; on the February, 1949 grand jury, one Negro was selected by the Commissioners but claimed his legal exemption because of being a practicing physician."

It is thus seen that in the selection of grand juries in Galveston County in the thirty years preceding the

indictment of Petitioner, two Negroes served as grand jurors. There is no indication in the stipulation as to when these two Negroes served, hence it may well be that there was one Negro on each of the last two grand juries preceding that which indicted Petitioner, or it may be that there were two Negroes on the last grand jury prior to the one which returned the indictment in this cause. It is stipulated that no Negro served upon the grand jury which indicted Petitioner; however, it is also stipulated that two Negroes served upon the next grand jury and one Negro was called for the grand jury following but asked to be excused, (R. 8.) each of these grand juries being after Petitioner's indictment on August 16, 1948, but prior to Petitioner's motion to quash the indictment on March 15, 1949.

It is stipulated that there is no discrimination against Negroes in "the selection, drawing and summoning of petit or trial juries" in Galveston County. (R. 7.) In other words, Petitioner's contention is that there is discrimination in the selection of grand juries but no discrimination in the selection of the juries which try the cases and decide upon the guilt or innocence of the accused, and his conviction should be reversed. Indeed, in the trial jury which participated in the case against the Petitioner, there were six Negroes upon the unexamined panel after the jury was selected. Petitioner used only twelve of his fifteen peremptory challenges, hence Petitioner could have, had he desired, challenged three of the white jurors in an attempt to secure Negroes upon the trial jury.

POINT ONE

There being no intentional or systematic exclusion of Negroes in the selection of the trial jury which found Petitioner guilty, the lack of Negroes among the jury commissioners and upon the grand jury, whose function is merely the returning of an indictment, is harmless error.

Argument and Authorities

This case is unprecedented. A precise parallel to this case is not to be found in the cases cited by Petitioner, and the point here argued has not been raised under similar circumstances by the respondents in prior cases decided by this Court.

In *Strauder v. West Virginia*, 100 U. S. 303 (1880), the State's *statute* provided that *no* Negro was eligible to be a member of any grand or petit jury. The stipulation in the case at bar shows Negroes have been grand jurors and petit jurors in Galveston County.

In *Neal v. Delaware*, 103 U. S. 370 (1881), the State conceded that Negroes had always been excluded from grand and petit juries because of their race and color. The stipulation in our case (R. 4-8.) reveals no such state of affairs in Galveston County, and the State denies any such conditions there exist.

In *Carter v. Texas*, 177 U. S. 442 (1900), a case from Galveston County, no Negro had ever served on the grand jury and there was an unlimited tender of evidence to support allegations of discrimination in the selection of the grand *and petit* juries. The State made no denial, but the trial court refused to hear

any evidence on the issue and overruled the motion. In the present case, the State denied discrimination because of race and color, and the trial court received all of the evidence which was tendered, the stipulation in this record. (R. 4-8.) This evidence makes no showing as to the conduct and procedure of the jury commissioners, but does affirmatively show the selection and summoning of the petit jury to have been free of any racial discrimination. (R. 8.)

In *Norris v. Alabama*, 294 U. S. 587 (1935) there was direct evidence of racial discrimination in the selection of grand jurors by designating the name of every Negro on a preliminary list of prospective jurors by placing "col." after these names. Furthermore, there had been no Negro grand jurors within the memory of any of the witnesses, it was shown that Negroes had been excluded from *any* jury service for many years, and an attempt appears to have been made to tamper with the jury roll by adding names of Negroes after the issue of discrimination was made. The stipulated facts in the case at hand reflect no such unrebutted and patently aggravated situations; the converse appears from the presence of Negro grand jurors in Galveston County both before (R. 5.) and after (R. 8.) the grand jury which returned this indictment.

In *Pierre v. Louisiana*, 306 U. S. 354 (1939) the allegations of racial discrimination in selection of both grand and petit jurors were accompanied by tenders of witnesses and were *uncontested.* Although both grand and petit jurors were selected from the

same panel, the lower court quashed only the petit jury. The State argued that the composition of the grand jury could not affect the accused's Constitutional rights. Here we find our nearest parallel to the instant case because this Court held it to be already *established* that grand juries must be selected without discrimination, citing *Neal v. Delaware* and *Norris v. Alabama*, above. But careful examination makes it obvious this *Pierre Case* and the present case are by no means alike or parallel: There had been but a single Negro called for *any* jury service and *no* Negroes at all selected for grand jury service within the memory of any witnesses in this Louisiana parish, where Negroes made up substantially one-half of the population; the authorities cited were not cases decided squarely and standing alone upon *grand jury* discrimination; and, no cogent reasons were advanced to show how the grand jury's composition "would work that fundamental unfairness which is at war with due process."[6] The stipulated facts which govern the State and Petitioner in this case show Negro grand jurors serving before and after the time of Petitioner's indictment and particularly show Negroes called to serve on two grand juries immediately prior to the presentation of the motion to quash, they show petit jurors selected without discrimination, and they show thirteen Negroes on the panel from which the petit jury which convicted Petitioner was selected.

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[6] This quotation from *Lisenba v. California*, 314 U.S. 219, on due process of law was held to have identical application to equal protection of the laws in *Akins v. Texas*, 325 U.S. 398, 402.

In *Smith v. Texas*, 311 U. S. 128 (1940), the proposition that a defendant's rights are substantially violated by discriminatory selection of the grand jury was *not challenged*, and evidence of discrimination was found. In the present case, on the other hand, Respondent urges that a lack of Negro grand jurors is harmless to Petitioner, and the stipulations in this record further distinguish this from the *Smith Case*.

In *Hill v. Texas*, 316 U. S. 400 (1942), no Negro had been on a grand jury for sixteen years, and the State offered no evidence upon the issue of racial discrimination in selecting the grand jury. The jury commissioners testified to their lack of knowledge respecting Negroes qualified for grand jury service. Without discussion upon the manner in which these facts denied the rights of the Petitioner, it was held the failure of the jury commissioners to inform themselves respecting the qualifications of available Negroes was itself discriminatory. The stipulations in the present case do not refer to the knowledge or practices of the jury commissioners, and, these matters not being at issue, it must be assumed that these jury commissioners properly did their duty in this regard. It is significant that the Court in *Hill v. Texas* stated that *Neal v. Delaware*, *supra*, was "a case substantially like the present," although the *Neal Case* involved a clear showing that all Negroes had always been excluded both from grand jury service and from petit jury service; the Court in the *Neal Case* explained the right to which the accused was entitled was to have no racial discrimination "in

the selection of jurors *to pass upon his life, liberty, or property,*" a function *grand* jurors do not perform.

In *Akins v. Texas*, 325 U. S. 398 (1945), issue was not joined on the precise question of the manner in which equal protection of the laws was denied by discriminatory grand juror selection. The majority opinion of this Court was that the facts in that case did not establish racial discrimination, while Mr. Justice Murphy was of the opinion that the facts revealed a systematic intention to select one Negro on each grand jury. The stipulations under review here show no evidence of systematic limitation. If any discrimination at all appears, which Respondent denies, it is urged to be but harmless error as to the Petitioner.

In *Cassell v. Texas*, 339 U. S. 282 (1950), the Court divided upon what facts revealed racial discrimination in selecting the grand jury. The two views were (1) that discrimination appeared because the jury commissioners revealed failure to familiarize themselves fairly with the qualifications of eligible jurors without regard to race and color and (2) that discrimination appeared because the jury commissioners mistakenly felt a single Negro on each grand jury was the desired result. The stipulations in the present case distinguish this from the *Cassell Case* because the facts here present no evidence on the manner in which individual jury commissioners discharged their duties. Although the issue was not urged by the pleadings of Respondent, Mr. Justice Jackson asserted in his dissent in

the *Cassell Case* the view now urged by Respondent. Respondent now urges this view because for the first time the true significance of alleged past discrimination in grand juror selection appears in an isolated and revealing setting.

It is well established that the use of a grand jury is optional with the several States and that indictment by grand jury may be abolished and indictment by information or complaint substituted.[7] The Texas Court of Criminal Appeals took judicial notice of the fact that

> "We have known of none ever having held such position [county attorney] in our memory save white persons. All judges since the days of the Reconstruction, as well as Justices of the Peace, and also Legislators, have been white persons; and it is only left as a matter of speculation how far the deeds of our fathers shall be the basis of an assumption of misdeeds for the present generation." (R. 18.) (233 S. W. 2d 126, 131.)

Thus, should Texas abolish the grand jury and establish a procedure in felony cases of commencement by information issued by a magistrate, justice of the peace, judge, or whoever shall be denominated the issuing officer, the question of discrimination against Negroes in the selection of those *elected* officials would not arise. This would be true even though the persons who hold the office from which the information or complaint is issued would in each case be a member of the white race.

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[7] *Hurtado v. California*, 110 U.S. 516 (1883).

A grand jury in Texas has only one function. It may either return an indictment against a defendant or refuse to indict him. The duties of a Texas grand jury are set out in Article 381, Texas Code of Criminal Procedure, as follows:

> "The grand jury shall inquire into all offenses liable to indictment of which any member may have knowledge, or of which they shall be informed by the attorney representing the State, or any other credible person."[8]

It is not incumbent upon the grand jury to hear the testimony of any witnesses other than those appearing for the prosecution. Based upon this evidence its sole function is to decide whether an indictment shall be presented. In the event of presentation of an indictment, no presumption is created as to the guilt of the accused. Indeed, the presumption of innocence continues throughout the trial, and each element of the crime for which the accused has been indicted must be proved beyond reasonable doubt before a trial jury. On the other hand, should the grand jury decide that the accused has not committed the act which is brought to its attention, it can refuse to return an indictment, this being known in Texas as a "no bill."

An indictment is no evidence of guilt and cannot be so considered. It is a completely isolated incident from the trial itself, and is merely an antecedent step. In this regard, the grand jury is largely an arbitrary and autonomous body, granted the latitude

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[8] Texas Code of Criminal Procedure (Vernon, 1948).

to indict or not upon any quantity or quality of evidence. There is no jeopardy in a no bill, and the mere failure to indict does not act as a bar to the State's attorneys presenting the same evidence to other grand juries selected in the county. There being no statute of limitations on murder,[9] this would mean that in the instant case the prosecuting attorney of Galveston County could have attempted indefinitely to secure an indictment against the Petitioner. Even under the doctrine as established by this Court, it is entirely possible and highly probable, without successful contention of systematic exclusion or limitation, that in the future there will be a grand jury without a Negro serving.

Inherent in the cases decided by this Court is the assumption that Negro grand jurors would not return an indictment against an accused simply because the accused was also a Negro, even though the same evidence would lead other qualified persons to indict. This, it is contended, is an unreasonable assumption. But even with this assumption, the State's attorney could overcome this bar by waiting for a grand jury composed entirely of white persons. Even under the present grand jury system in Texas it is not necessary that all the members of a grand jury vote to indict. The Texas statutes provide that nine members of a grand jury may indict.[10] Thus, assuming the correctness of the Court's assumption and assuming that members of the Negro

[9] Article 180, Texas Code of Criminal Procedure (Vernon, 1948). Appendix, page 21.

[10] Articles 391 and 393, Texas Code of Criminal Procedure (Vernon, 1948). Appendix, at page 24.

race served upon every grand jury, it would not necessarily mean that the grand jury would be compelled to refuse to return an indictment against a member of the Negro race.

These propositions, when coupled with the fact that *all* the members of a trial jury must vote for conviction while only nine members of a grand jury need join in an indictment, serve to fortify the proposition that the absence of a Negro from the grand jury which indicted Petitioner was harmless error in view of the complete lack of discrimination over a long period of time in the selection of trial juries. The holding of the Texas courts in the instant case may seem to be based mainly upon the same propositions that were presented in the dissent of Mr. Justice Jackson in *Cassell v. Texas*, 339 U.S. 282 (1950), but in the *Cassell Case* there was no stipulation such as in this case that "in . . . the selection . . . of petit or trial juries . . . there is not now and has not been for many years any discrimination against Negroes in Galveston County." It is respectfully urged that this Court, in the light of the stipulation in this case, consider the effect of the absence of a Negro from the indicting grand jury upon the end result of the complete trial procedure. Certainly no beneficial purpose will be served by reversing the conviction of the Petitioner in this case, making it incumbent upon the State to reindict and retry one who was convicted upon a fair trial. Should there be indicated in the present record a policy or custom of intentional and systematic exclusion of Negroes from grand jury service, the abuse could best be corrected,

as stated by Mr. Justice Jackson, in the enforcement of the existing Federal penal statutes.

And it is submitted that to find an absence of Negroes from among the jury commissioners of Galveston County violated as a matter of law the equal protection due this Petitioner would be to disregard the proper function of the jury commissioners, unrelated as it is to any given citizen who may subsequently be accused of crime; it would cast unwarranted and wholly unjustifiable reflections upon the manner in which the District Judges of Galveston County have throughout the years discharged their statutory duties in the selection of jury commissioners.

Incidentally, Petitioner seeks to qualify the language of his stipulation respecting the selection of petit jurors (R. 7.) by urging that Respondent has been guilty of racial discrimination through the exercise by the State's attorneys of their peremptory challenges. The stipulation must, of course, speak for itself. The identical contention concerning peremptory challenging of Negro jurors by the prosecution was rejected in *People v. Roxborough*, 307 Mich. 575, 12 N. W. 2d 466, 473, certiorari denied, sub nom. *Roxborough v. Michigan*, 323 U.S. 749 (1944). And it was again rejected in *Hall v. United States*, 168 F. 2d 161, 164, certiorari denied 334 U.S. 853 (1948).

POINT TWO

The practice, if any, of excluding Negroes from grand jury service having been discontinued prior to the selection of the grand jury which indicted Peti-

tioner, absence of Negroes from the grand jury returning the indictment in this cause does not constitute a denial of the equal protection of laws.

Argument and Authorities

An attempt further to review in any detail the cases concerning discrimination against Negroes in the selection of grand juries is unnecessary in view of the familiarity of this Court with the law concerning that subject. Briefly stated, this Court has held that a mixed jury in each case is not required by the equal protection clause of the Fourteenth amendment.[11] At the most, it requires only that there be no intentional and systematic exclusion of Negroes from grand jury service solely because of race.[12] Systematic exclusion may be shown by a long continued exclusion of Negroes from grand jury service.[13]

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[11] *Martin v. Texas*, 200 U.S. 316, 320 (1906): "A different conclusion in this case would mean that, in a criminal prosecution of a negro for crime, an allegation of discrimination against the African race, because of their race, could be established by simply proving that no one of that race was on the grand jury that returned the indictment or on the petit jury that tried the accused; whereas, a mixed jury, some of which shall be of the same race with the accused, cannot be demanded, as of right, in any case, nor is a jury of that character guaranteed by the Fourteenth Amendment. . . ."

Snowden v. Hughes, 321 U.S. 1, 8 (1944): ". . . But a discriminatory purpose is not presumed . . ., there must be a showing of 'clear and intentional discrimination' . . . But a mere showing that Negroes were not included in a particular jury is not enough; there must be a showing of actual discrimination because of race."

[12] *Ibid.*

[13] *Patton v. Mississippi*, 332 U.S. 463 (1948); *Pierre v. Louisiana*, 306 U.S. 354 (1939); *Norris v. Alabama*, 294 U. S. 587 (1935).

The stipulation in this case is to the effect that two Negroes had served upon the grand juries of Galveston County in the thirty years preceding the selection of the grand jury which indicted Petitioner. It is also shown in the stipulation that Negroes have served or have been called upon the grand juries following that which indicted the Petitioner and prior to the filing of the motion to quash in this case. (R.8). Petitioner pointed out in his Motion for Rehearing in the Texas Court of Criminal Appeals that a Negro was appointed as Jury Commissioner in Galveston County in 1950 and three Negroes served on the grand jury for the June Term, 1950. There is nothing contained in the stipulation or in the record which would indicate which juries contained the two Negroes who, it is stipulated, served during the thirty-year period. Based upon the presumption that the officials of a State or county will carry out their duties in a legal manner[14] and the stipulation in this record, it is clear Galveston County has discontinued in recent years any practice of excluding Negroes from grand jury service. With these stipulations before him, it was no abuse of discretion for the trial judge to find the motion to quash was not supported by the evidence.

This being true, the cases which hold that a showing of long continued absence of Negroes from grand juries creates a *prima facie* showing of intentional and systematic exclusion of Negroes from grand jury service are not applicable here. Certainly there is some time when a county can change its policy,

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[14] *Akins v. Texas, supra; Martin v. Texas, supra.*

and upon such a change the past acts of that county will no longer cast a stigma upon its future acts. This Court has indicated that it will accept some intermediate point as a beginning point for its determination as to the existence of a custom of exclusion.[15]

This case does not reflect any unlimited tender by Petitioner of evidence to show racial discrimination in selecting this grand jury, followed by failure of Respondent to counter such a tender. On the contrary, the facts come into the record by way of a joint presentation by Petitioner and Respondent. This stipulation contains no showing that the two Negro grand jurors in Galveston County were not upon one or two grand juries just prior to the one that Petitioner argues to have been tainted by racial discrimination. And the stipulation further shows that after Petitioner's indictment (but *prior* to the time this issue was first raised by Petitioner's motion to quash) several Negroes were called for grand jury service. It may thus be fairly stated that commencing with two grand juries prior to the grand jury which indicted Petitioner and with the exception of that particular grand jury, there have been one or more Negroes on each grand jury up to June, 1950, the latest indicated in this record. There has also been a Negro Jury Commissioner in Galveston County. This clearly warranted the trial court's apparent belief that there had been an abandonment of any practice or custom which might have existed in the past, and certainly does not leave the grand jury which indicted Petitioner tainted by any intentional or systematic exclusion of Negroes. It is proper to

[15] *Cassell v. Texas, supra; Akins v. Texas, supra.*

weigh all of the evidence as to the surrounding circumstances in passing upon allegations of racial discrimination. There is no evidence that there was any element of intentional exclusion of Negroes from the grand jury which presented the indictment against Petitioner. Neither is there evidence that the jury commissioners did not fully and fairly consider all eligible citizens in the selection of this grand jury. Indeed, there is no evidence at all with regard to the selection of this grand jury. Absent a *prima facie* showing based upon past events, Petitioner's contentions must fail.

CONCLUSION

It is respectfully submitted that this case should be affirmed.

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APPENDIX

Constitutional and Statutory Provisions of Texas

Constitutional Provisions

Article V, Section 13: "Grand and petit juries in the District Courts shall be composed of twelve men; but nine members of a grand jury shall be a quorum to transact business and present bills. In trials of civil cases, and in trials of criminal cases below the grade of felony in the District Courts, nine members of the jury, concurring, may render a verdict, but when the verdict shall be rendered by less than the whole number, it shall be signed by every member of the jury concurring in it. When, pending the trial of any case, one or more jurors not exceeding three, may die, or be disabled from sitting, the remainder of the jury shall have the power to render the verdict; provided, that the Legislature may change or modify the rule authorizing less than the whole number of the jury to render a verdict."

Article XVI, Section 19: "The Legislature shall prescribe by law the qualification of grand and petit jurors."

Statutory Provisions[18]

Article 180: "An indictment for any other felony may be presented within three years from the commission of the offense, and not afterward; except murder, for which an indictment may be presented at any time."

Article 333: "The district judge shall, at each term of the district court, appoint three persons to

[18] Texas Code of Criminal Procedure (Vernon, 1948).

perform the duties of jury commissioners, who shall possess the following qualifications:

1. Be intelligent citizens of the county and able to read and write.
2. Be qualified jurors and freeholders in the county.
3. Be residents of different portions of the county.
4. Have no suit in said court which requires the intervention of a jury."

Article 335: "When the appointees appear before the judge, he shall administer to them the following oath: 'You do swear faithfully to discharge the duties required of you as jury commissioners; that you will not knowingly elect any man as juryman whom you believe to be unfit and not qualified; that you will not make known to any one the name of any juryman selected by you and reported to the court; that you will not, directly or indirectly, converse with any one selected by you as a juryman concerning the merits of any case to be tried at the next term of this court, until after said cause may be tried or continued, or the jury discharged.' "

Article 336: "The jury commissioners, after they have been organized and sworn, shall be instructed by the judge in their duties and shall then retire in charge of the sheriff to a suitable room to be secured by the sheriff for that purpose. The clerk shall furnish them the necessary stationery, the names of those appearing from the records of the court to be exempt or disqualified from serving on the jury at each term, and the last assessment roll of the county."

Article 338: "The jury commissioners shall select sixteen men from the citizens of the different por-

tions of the county to be summoned as grand jurors for the next term of the court."

Article 339: "No person shall be selected or serve as a grand juror who does not possess the following qualifications:

1. He must be a citizen of the State, and of the county in which he is to serve, and qualified under the Constitution and laws to vote in said county; but, whenever it shall be made to appear to the court that the requisite number of jurors who have paid their poll taxes can not be found within the county, the court shall not regard the payment of poll taxes as a qualification for service as a juror.
2. He must be a freeholder within the State, or a householder within the county.
3. He must be of sound mind and good moral character.
4. He must be able to read and write.
5. He must not have been convicted of any felony.
6. He must not be under indictment or other legal accusation for theft or of any felony."

Article 340: "The names of those selected as grand jurors by the commissioners shall be written upon a paper; and the fact that they were so selected shall be certified and signed by the jury commissioners, who shall place said paper, so certified and signed, in an envelope, and seal the same, and indorse thereon the words, 'The list of grand jurors selected at ..... term of the district court,' the blank being for the month and year in which the term of the court began its session. The commissioners shall write their names across the seal of said envelope, direct the same to the district judge and deliver it to him in open court."

Article 344: "Within thirty days of the next term

of the district court and not before, the clerk shall open the envelope containing the list of grand jurors, make out a copy of the names of those selected as grand jurors, certify to it under his official seal and deliver it to the sheriff."

Article 391: "After all the testimony which is accessible to the grand jury shall have been given in respect to any criminal accusation, the vote shall be taken as to the presentment of an indictment, and, if nine members concur in finding the bill, the foreman shall make a memorandum of the same with such data as will enable the attorney who represents the State to write the indictment."

Article 393: "When the indictment is ready to be presented, the grand jury shall go in a body into open court, and, through their foreman, deliver the indictment to the judge of the court. At least nine members of the grand jury must be present on such occasion."

No. 600. Ross *v.* TEXAS. Certiorari, 340 U. S. 946, to the Court of Criminal Appeals of Texas. Argued April 23, 1951. Decided April 30, 1951. *Per Curiam:* The judgment is reversed, *Cassell* v. *Texas*, 339 U. S. 282. *Thos. H. Dent* and *W. J. Durham* filed a brief for petitioner. *Raymond E. Magee* argued the cause for respondent. With him on the brief were *Price Daniel*, Attorney General of Texas, *David B. Irons*, Administrative Assistant Attorney General, and *E. Jacobson*, Assistant Attorney General. Reported below: 154 Tex. Cr. R. —, 233 S. W. 2d 126.